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The Association's Congressional Legislative Program

THE convening of Congress is the signal for activity on the part of a number of the American Bar Association committees and sections.

One of the most important measures which the Association is pushing is the Act to promote the conservation of petroleum and natural gas, formulated by the Committee of Nine appointed at the suggestion of former Secretary of the Interior, Dr. Work, and recommended for approval by the Committee on Conservation of Mineral Resources of the Mineral Law Section. It was indorsed by the Association at the Seattle meeting.

The Committee on Commerce, of which Mr. Rush C. Butler of Chicago is chairman, will present at the present session, it is understood, the measure relating to the arbitration of industrial disputes, heretofore approved by the Association. Chairman Butler and Mr. Cohen constitute a subcommittee having this very important matter in charge. Mr. Fowler of the same committee is the congressional engineer for the Contract and Sales Bill similar to that proposed by the Commissioners on Uniform State Laws for state enactment; also the bill for payment of interest on judgments rendered against the United States. Bills covering these subjects have been introduced in previous sessions. Mr. Arthur Geary, of the committee, has in charge a bill relating to bills of lading for carriage of goods by sea—a bill which did not originate with the committee but concerning which it has made certain suggestions for amendments.

The Committee on Jurisprudence and Law Reform, of which Hon. Paul Howland of Cleveland, O., is chairman, has been charged with a large responsibility by the Association. It will oppose the Norris, Carraway and Shipstead bills, and attempt to arrange for hearings before the proper committees in opposition thereto. It has also a large constructive program. This committee held a meeting at Washington on December 14 at which a definite program of action was considered.

The program of the Committee on Uniform Judicial Procedure, according to Chairman Thomas W. Shelton of Norfolk, Va., is first to try to bring about the enactment in the Senate of the bill giving the Supreme Court the rule-making power on the law side of its jurisdiction (S. 759) and thus have it come to the House as a Senate Bill. This method of dealing with the measure is due to the opposition of Chairman George S. Graham of the Judiciary Committee of the House of Representatives. Chairman Shelton writes that "there is a promise of a vote at the short session. If so, it will be favorable. Every legitimate pressure should be used to this end. As many letters as possible should go to Senators to this effect. As a Senate Bill, it will in due course go to the House, where a large majority have written that they would vote for it, though it reached them on an adverse report from the House Committee."

Chairman T. Catesby Jones, of the Association's Committee on Admiralty and Maritime Law, writes, in reply to the JOURNAL's request for his Committee's immediate congressional program that "the Committee has a number of matters under consideration, but none of them has reached the stage where we feel that they are ready for legislative action, and the Committee will urge no bill before the next Congress."

The Committee on the Division of the Eighth Circuit, of which A. C. Paul of Minneapolis is Chairman, will be active this session in support of the measure recommended by the Bar Association. An effort will be made to secure hearings before the proper committees of Congress at an early date.

Chairman John T. Richards, of the Committee on the Removal of Government Liens on Real Estate, informs us that the bill mentioned in his report at the Seattle meeting "is now pending in the House of Representatives, and I presume will be passed by that body at the present session. Whether we will be able to secure its passage in the Senate is problematical, and if we fail to do so, we must begin all over again with the Seventy-first Congress."

The Committee on Aeronautical Law, of which Mr. Chester W. Cuthell of New York City is chairman, held a meeting in New York City on Dec. 12. At present, the chairman informs us, it has no legislation to urge upon Congress.

Association's Radio Program

BEGINNING on Thursday evening, January the third, at 7:30 P. M. eastern time, the American Bar Association will begin broadcasting a series of addresses by notable speakers on legal subjects of particular public interest. The series will continue for sixteen weeks and the speakers will be "on the air" on successive Thursdays for that period at the time stated. The addresses will be sent out by the National Broadcasting Company and Associated Radio Stations. The Association's Committee on Publicity, of which Mr. Walter H. Eckert of Chicago is charman, has the undertakng in charge. A list of prominent speakers is now being made up and will be announced later.

Contingent Fee Accident Litigation in Philadelphia

THE Law Association of Philadelphia, at a meeting on Oct. 16, adopted with certain changes the recommendations of its special committee appointed to investigate "contingent fee accident litigation." The Philadelphia investigation, unlike that conducted in New York City, was not judicially authorized, and the committee in charge, therefore, lacked certain powers possessed by the New York investigators. This circumstance, however, does not seem to have prevented it from securing all necessary information as to conditions existing in that city.

Questionnaires to accident companies and lawyers engaged in this class of litigation, coupled with interviews with the plaintiffs in a large number of cases, revealed practically the same organization for securing and handling the business that was set forth in Justice Wasservogel's report in New York city. There were the familiar varieties of "lead men"—political division leaders, members of the police force, orderlies, ambulance drivers, telephone operators at hospitals, physicians, newspaper reporters, etc. Their business, as the title suggests, is to give the earliest reports of accidents to their favorite legal firms or to "independent adjusters," all of course for a consideration. The actual "power of attorney" is secured either by "runners" employed by certain firms for this purpose, by "independent adjusters," who turn the cases over to the lawyers of their choice in case they can't settle with the insurance companies directly, or in some cases by the lawyers themselves,

when the case is under the control of a physician or someone else and the injured person is referred to the firm directly. The connection of the "runners" with many law firms is cloaked in various ways, but the essential connection is there and is practically, if not openly, admitted. Accident lawyers appearing before the committee disapproved of the employment of "runners," but urged the stress of competition in mitigation. They agreed the practice should be abolished and welcomed the cooperation of the committee to bring it about.

The committee in its report, which is published in full in a supplement to the November, 1928, issue of the Massachusetts Law Quarterly, recommended the adoption of certain rules of court as a means of remedying the situation. To curb solicitation it recommended the following rule: "No attorney shall, directly or indirectly, pay or give, or sanction the payment or gift for his benefit of any money or thing of value, in consideration or in recognition of services in connection with the employment of such attorney in any claim for the recovery of damages for injury to persons or property." In order to preclude the prosecution of legal claims by persons not members of the Bar—in other words, to eliminate the "independent adjusters"—it recommended the following rule:

"No attorney shall handle any claim for personal injuries save for the party legally entitled to damages therefor or for another member of the bar, and no attorney shall, directly or indirectly, divide his fee with or pay any part thereof to any person not a member of the bar, or not in his exclusive employ. All damages collected by an attorney on account thereof shall be paid (after the deduction of proper charges) direct to such party irrespective of any claim by any party not a member of the bar to any part thereof. The purpose of this Rule is to preclude the handling and barter of accident claims by persons not members of the bar, and hence not subject to supervision and discipline by the Court. Attorneys are expected to cooperate in the observance of the spirit, as well as the letter of this, Rule."

The Association approved these two recommendations, with the addition of a resolution to the effect that it was the sense of the meeting that they should include the branches of law other than acident litigation.

The committee report recommended this rule relative to "Powers of Attorney for Contingent Fees," which was adopted:

"No attorney shall institute or prosecute any action or undertake the collection of a claim, for the recovery of damages for personal injuries under an arrangement with his client for a contingent fee, unless:

"(1) Either the basis for the fee be a proportion of the net recovery after deducting all expenses not properly payable by the attorney, or the client be assured at least a specified proportion of all the gross recovery, the attorney paying all proper expenses;

"(2) The power of attorney embodying such arrangement shall distinctly provide that in case of the client's dissatisfaction with the amount of the fee charged, he may require the attorney to submit to the Court in which the suit was brought (or to the Court in which the contract writs are then running if no suit has been brought) the question as to what, under all the circumstances, is a fair and proper charge for the attorney's services."

It dealt with the evil of improper settlements with the following suggested rule, which was amended by the Association by changing "six" years to "three" and by substituting "agreement" for "power of attorney" in the last paragraph.

"Every attorney effecting the recovery of damages for personal injuries, whether by settlement or through litigation, shall forthwith fill out, in duplicate, a statement, in substantially the form set out below, showing in reasonable detail the disposition of the amount received. One such copy shall be delivered to the client, and the other shall be preserved by the attorney for six years following such settlement, subject to inspection by the client, by the Court, and by the Committee of Censors of the Law Association. Such statements accumulated by an attorney ceasing to practice may be turned over to the then Chairman of such Committee.

"No power of attorney in any such case shall authorize the settlement of the claim for a sum less than that expressly approved by the client." (Form of statement follows.)

The medical "broker" or "runner" is dealt with as follows:

"No attorney engaged in handling any case (whether in suit or not) involving damages for personal injuries, shall, directly or indirectly, hold out to any medical practitioner the promise, assurance or hope of compensation contingent on the outcome thereof, nor shall any such attorney, after the successful termination thereof, pay or give to any such physician, in recognition of the services of such physician in connection with such case, whether as a gratuity or otherwise, any money or thing of value, in addition to the compensation at the specified rate agreed on by the attorney, win or lose, at the time such physician was employed by the attorney."

The above was adopted, but a proposed rule restricting expert medical testimony to medical practitioners approved by the courts was rejected by the Association. It reads:

"Expert medical testimony in cases involving personal injuries, shall be confined to medical practitioners selected by the Court from a list nominated by the Council of the College of Physicians. A copy of such approved list shall be kept by the Clerk of each Court open to inspection. In case any attorney desires the services of any expert in any branch not covered by such list, the Court in which the case is pending may designate such a one. The fees of such medical witness shall be paid by the party calling him and shall not be chargeable as part of the taxable costs of the case."

Under the title of "Abuses by Defendants," the committee's report comments on "the securing of releases immediately succeeding the accident," "the practice of settling small claims known to be invalid," "delegation of subrogation claims to other than the regular attorneys of the insurance companies," "erroneous information by insurance companies as to amount of policy," and "refusal to settle small claims for property damage."

The report was signed by the following members of the special committee: Franklin E. Barr, Frederic L. Ballard, John Arthur Brown, Shippen Lewis, Francis A. Lewis, 3rd, Benjamin H. Ludlow, William Clarke Mason, Lemuel B. Schofield, Henry S. Drinker, Jr., Chairman.

American Legion Favors Proposed Uniform Guardianship Act

AT the Tenth Annual Convention of the American Legion, held recently in San Antonio, Texas, a resolution was adopted favoring the Proposed Uniform Veterans' Guardianship Act and expressing its appreciation to the American Bar Association for its interest in uniform legislation pertaining to guardianship and commitment of Veterans' Bureau wards. The resolution reads as follows:

"Whereas, The American Legion believes that the Veterans of the World War, and other wars and expeditions, who are afflicted mentally, and minor dependents of veterans whose disability or death is due to service during the World War should be adequately cared for by a grateful Nation; and

"Whereas, The American Legion believes that incompetent veterans should be committed to U. S. Veterans' Hospitals instead of State Hospitals, and

that the estates of both minor and incompetent beneficiaries entitled to receive compensation or insurance from the U. S. Veterans' Bureau should be carefully protected to insure that such benefits will inure solely to the benefit of such beneficiaries, and

"Whereas, there has been drafted a proposed Uniform Veterans' Guardianship Act which was approved by the National Conference of Commissioners on Uniform State Laws at its thirty-eighth Annual Conference, held at Seattle, Washington, on July 23, 1928, and by the American Bar Association at its semi-centennial meeting held at Seattle, Washington, July 25, 1928, and has been referred to the Respective Commissioners for presentation to the Legislatures of the various States with a view to its enactment thereby,

"Therefore, Be It Resolved, That the American Legion in its Tenth Annual Convention assembled expresses its appreciation to the American Bar Association for its interest on uniform legislation pertaining to Guardianship and commitment of Veterans' Bureau wards, and be it further

"Resolved, That the American Legion advocates the adoption by the various State Legislatures of the principles of such proposed uniform law as may be consistent with the public policy of the respective states."

Bar Influence in Judicial Elections

REPORTS from various cities in which the Bar Associations have made special efforts to be of assistance to the voters in the selection of judges show gratifying results. A feature of special importance in the elections in Chicago, St. Louis and Cleveland was the success of candidates for prosecuting attorney—(the title varies but the office is practically the same)—who had the indorsement of the Bar Associations. Attention to these officials, in addition to the judicial candidates, is a comparatively recent thing, and was largely brought about by surveys which revealed their outstanding importance in the administration of justice. Press comments in these cities are as a rule highly appreciative of the part which the local associations are playing in the election of judges and prosecutors.

A letter from Mr. A. V. Abernethy, secretary of the Cleveland Bar Association, has the following account of the encouraging results achieved in that city. It reads, in part, as follows:

"For the third consecutive year, all of the candidates for the judiciary recommended by The Cleveland Bar Association were elected. In the last three years the entire slates of this Association have been elected without a "crack."

"In addition this year the candidate for the office of Prosecuting Attorney who was endorsed by this Association was elected.

"Our action with respect to candidates for Prosecuting Attorney of the County this year marked a precedent for this Association. Some time prior to the primaries, which were held August 14th, and at which the political parties nominated candidates for Prosecuting Attorney, the Executive Committee of this Association had a committee appointed to go over the list of candidates for Prosecuting Attorney at the various party primaries and, if necessary, persuade outstanding members of the Bar to become candidates for the nomination. A committee of five lawyers, all leaders at the Bar, made up of Wm. H. Boyd, Chairman; Harrison B. McGraw, Chas. H. Olds, David E. Green and Nathan Loeser, was appointed. This committee examined the list of aspirants for the nomination of the Democratic party primary and recommended that the Association

approve Ray T. Miller, who by the way was the candidate of the regular Democratic party organization.

"The special committee, after examining the list of aspirants for the nomination for Prosecuting Attorney at the Republican party primary, persuaded George B. Harris, Esq., a well-known member of the Bar and active in the affairs of the American Bar Association, to become a candidate at the Republican party primary. Mr. Harris consented.

"The Association then conducted a referendum vote, and on the ballot there was printed the names of the several aspirants at the Democratic party primary and the names of the several aspirants at the Republican party primary, with the result that Mr. Harris and Mr. Miller were endorsed by the Association. Mr. Miller was nominated and Mr. Harris was defeated in the Republican party primary. The Association conducted a very vigorous campaign to secure the nomination of both.

"In the general election, which took place November 7th, Ray T. Miller, Democrat, was elected. He was one of only two Democrats elected in the County, and various other candidates for Republican county offices being elected by majorities that reached as high as eighty thousand.

"The Cleveland Bar Association recommended the re-election of Appellate Judge John J. Sullivan and Probate Judge George S. Addams, and they were unopposed; also the re-election of Common Pleas Judges Homer G. Powell, Fredrick P. Walther and Carl V. Weygandt, who were opposed by Municipal Judge Thomas E. Greene, Attorneys William Gordon and Robert Fisher. The vote was as follows, the first three being the Bar Association endorsees: Powell, 186,212; Walther, 190,800; Weygandt, 216,151; Greene, 126,477; Gordon, 37,940; Fisher, 27,067.

"Thus the Bar Association's ticket led the opposition by approximately sixty thousand votes."

We are indebted to Hon. Guy A. Thompson, member of the Association's Executive Committee and leading spirit in the now famous "Missouri Survey," for the following brief account of results in St. Louis:

"There were nine Circuit Judges and the Circuit Attorney to be elected on November sixth. This city, as you know, is overwhelmingly Republican. A great number of Republicans filed for nomination for Circuit Judge at the primary held in August, and a goodly number of Democrats. Four or five Republicans filed for the office of Circuit Attorney and two Democrats. Preceding the official primary the Bar Association of St. Louis held a primary upon these candidates, voting for nine Republican and nine Democratic candidates for Circuit Judge, and one Republican and one Democrat for Circuit Attorney. All except two of the Republican candidates and one of the Democratic candidates for Circuit Judge thus selected by the Bar Association were nominated at the official primary held soon thereafter. The Republican chosen at the bar primary for Circuit Attorney was defeated at the official primary, and the Democratic candidate for that office chosen at the bar primary was nominated at the official primary.

"About a month before the election of November sixth another election was held by the Bar Association of St. Louis. This time the vote was for nine of the candidates for Circuit Judge regardless of party, and for one candidate for Circuit Attorney regardless of the party. Six Republicans and three Democrats were chosen for Circuit Judge and the Democratic candidate was chosen for the office of Circuit Attorney. At the election which followed on November sixth these identical candidates were elected by the people.

"No recommendation was made by the Association for State Judgeships."

Secretary J. C. Travis, of the Omaha Bar Association, gives the results in that city. The fact that the radio audience of today is no mere theory but a fact to be taken into consideration at elections is indicated by the election of the chief announcer of WOW broadcasting station to the municipal bench in that city. Mr. Travis' letter follows, in part:

"This Association immediately after the Primaries were held here in April took action looking to the endorsement of candidates for the Supreme, District and Municipal Courts. There were two candidates for Supreme Court with one office to be filled; eighteen candidates for the nine positions on the District Bench; two candidates for the office of County Judge, and six candidates for the three Municipal Judgeships.

"There were two candidates for Supreme Court Judge, viz: Judge F. S. Howell, now on the Supreme Bench filling a vacancy created by the death of his predecessor, and Judge L. B. Day, one of the local District Judges. At the Primaries Judge Day received a vote of some sixty-five hundred more than Judge Howell. Judge Howell was endorsed by this Association by a vote of over two hundred to something less than one hundred for Judge Day. Judge Day in the general election defeated Judge Howell by about twelve hundred votes.

"The candidates for District Judge included seven of the then incumbents, viz.: Judges Redick, Leslie, Hastings, Fitzgerald, Rait, Troup and Rhoades—Judges Rhoades and Rait having been appointed during the last year to fill vacancies. (Stalmaster was not a candidate, and Judge Day was a candidate for the Supreme Court.) The other candidates for District Judges included Judges Dineen, Neble and Baldwin of the local Municipal Court; Judge Foster, an ex-police Judge; Judge Slabaugh, an ex-District Judge; Mr. Grossman, an ex-Deputy County Attorney; Mr. Yeager, present Chief Deputy County Attorney; Mr. Thomsen and Mr. Page, who had previously held no elective office; R. L. Beveridge, who at one time was a member of the School Board, and Mr. North, at one time a candidate for Congress, but who withdrew his candidacy for District Judge in this election.

"The endorsement of the Bar went to the seven present incumbents, Mr. Thomsen and Mr. Page.

"All seven of the present incumbents except Judge Rait were elected, as were Judge Dineen, Foster and Mr. Thomsen.

"Two of the three present incumbents on the Municipal Bench were candidates for re-election, viz.: Judges Patrick and Holmes. Judge Baldwin was a candidate for the District Bench. The six nominees for these positions were Judges Patrick and Holmes, Mr. Elsasser, Mr. Kennedy, Lester Palmer and Mr. Anderson.

"The Bar endorsement went to Judges Patrick and Holmes and Mr. Elsasser by a healthy majority. Judges Patrick and Holmes were re-elected. Mr. Palmer was also elected. His candidacy is interesting from the standpoint that for many years he has been chief announcer of the WOW broadcasting station. The whole community was well acquainted with 'L. P.' By dint of his popularity as a radio broadcaster, he led the ticket for this office.

"The Bar endorsement was taken by mail vote, with each member being required to vote for the full number to be elected. In other words, any ballot for District Judges that did not designate nine was void. The result of the election was published in the local papers. Some of the candidates advertised their endorsement during their campaigns by divers methods.

"However, the Bar undertook no further unified action after making its endorsement, although a resolution looking to this was introduced, passed up to the Judicial Selective Committee and defeated upon the report of that Committee that they did not deem it advisable that the Association take any further action towards election of those endorsed by it."

Secretary George J. Martin, of the Bar Association of San Francisco, reports:

"There was only one State Judge to elect—a presiding justice of the District Court of Appeal. This Association endorsed the incumbent, who was opposed by one other candidate. The incumbent was re-elected after a strenuous campaign.

"There were four Superior Court Judges (local county judges) to elect. This Association endorsed three of the candidates (two of whom were unopposed), and all three were elected. The Association made no recommendation in the 4th department because neither of the candidates received the membership vote necessary to carry an endorsement under the constitution of the Association. However, the candidate who received the highest vote in the plebiscite was elected."

Executive Secretary Clarence Denning, of the Chicago Bar Association, reports the gratifying success of that very active organization at the recent election. It came out squarely for Swanson, the Republican candidate for State's Attorney, who was elected by a good majority. Twelve candidates for the municipal court for the full term were elected and one candidate to fill a vacancy on that Bench All those elected had received the approval of the Association's Committee on Candidates and all, with one or two exceptions, were approved by the Bar primary. Two of the sitting judges were not approved either by the Committee on Candidates or the Bar vote, and these were defeated.

THE DRAFTING OF A CODE OF CRIMINAL PROCEDURE

American Law Institute Undertakes Task at Request of Various Organizations—Extent To Which Information Should be Employed as Method of Prosecution One of the Most Important Questions Presented—Bearing of Constitutional Provisions of States—Effectiveness of Method Where Used at Present—Conclusions Reached—Amendments to Certain Constitutions Recommended

By Edwin R. Keedy

Professor of Law at University of Pennsylvania; One of the Reporters for the Code of Criminal Procedure

IN the early part of 1925 the Executive Committee of the American Bar Association, the American Institute of Criminal Law and Criminology and the Association of American Law Schools adopted resolutions requesting the American Law Institute to undertake the preparation of a code of criminal procedure. In May of that year the Council of the Institute voted that work on such a code should begin "as early as practicable." Soon thereafter a committee appointed by the Council submitted a comprehensive outline for the code and in December, 1925, the active work of drafting began. William E. Mikell, Dean of the Law School of the University of Pennsylvania, and the present writer were appointed Reporters. The original advisers were William S. Forrest of the Chicago Bar, Herbert S. Hadley, former Governor of Missouri, Robert W. Millar of Northwestern University, Justin Miller, Dean of the Law School, University of Southern California, Charles C. Nott, Jr., Judge of the Court of General Sessions, New York City, Harry Olson, Chief Justice of the Municipal Court, Chicago, Henry L. Stimson of the New York Bar, John B. Waite of the University of Michigan, and Tyrrell Williams of Washington University. Subsequently the following advisers were added: Joseph F. O'Connell of the Boston Bar, Rollin M. Perkins of the University of Iowa, Timothy N. Pfeiffer of the New York Bar, and Floyd E. Thompson, former Justice of the Illinois Supreme Court. Six chapters of the Code, covering Arrest, Preliminary Examination, Bail, Methods of Prosecution, Grand Jury and Indictment and Information have been completed. After approval by the Council these chapters were presented for discussion to the members of the Institute at the meeting in Washington in May, 1928. The chapters on Jurisdiction and Venue, Change of Venue, Waiver of Jury Trial, Process upon Indictment and Information, Arraignment, Pleas and Motions before Trial and Challenge of Trial Jurors are in course of preparation and it is expected that they will be presented to the next annual meeting of the Institute.

One of the important questions that had to be determined in the preparation of the Code was the extent to which the information should be employed as a method of prosecution. The constitutions of all the states except Georgia, Kansas, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, Vermont, Virginia and Wisconsin contain a provision prescribing the methods for prosecuting criminal cases. In Alabama,[1] Arkansas,[2] Delaware,[3] Kentucky,[4] Mississippi,[5] New Jersey,[6] North Carolina,[7] Oregon,[8] Pennsylvania,[9] South Carolina,[10] Tennessee[11] and West Virginia[12] prosecution by indictment is required in all but a few exceptional cases. The usual exceptions are (1) cases of impeachment, (2) cases arising in the land and naval forces or in the militia when in actual service in time of war or public danger, and (3) cases cognizable by justices of the peace. The constitutions of Illinois,[13] Maine,[14] New York,[15] Ohio,[16] Rhode Island[17] and Texas[18] require the indictment for serious offenses with similar exceptions. In Arizona,[19] California,[20] Connecticut (except for offenses punishable by death or imprisonment for life),[21] Idaho,[22] Louisiana (except in capital cases),[23] Missouri,[24] Montana,[25] Nevada,[26] New Mexico,[27] Oklahoma,[28], South Dakota,[29] Utah[30] and Washington[31] the constitutions expressly provide that indictable offenses may also be prosecuted by information. The legislature of Indiana, which is empowered by the constitution to modify or abolish the grand jusy system,[32] has enacted a statute per-

1. Const., 1901, Art. I, sec. 8.
2. Const., 1874, Art. II, sec. 8.
3. Const., 1897, Art. I, sec. 8.
4. Const., 1891, Bill of Rights, sec. 12.
5. Const., 1890, Art. III, sec. 27.
6. Const., 1844, Art. I, sec. 9.
7. Const., 1876, Art. I, sec. 12.
8. Const., 1857, Art. VII, sec. 18 (Amendment of 1908).
9. Const., 1873, Art. I, sec. 10.
10. Const., 1895, Art. I, sec. 17.
11. Const., 1870, Art. I, sec. 14.
12. Const., 1872, Art. III, sec. 4.
13. Const., 1870, Art. II, sec. 8, i. e. "except in cases in which the punishment is by fine, or imprisonment otherwise than in the penitentiary.
14. Const., 1819, Art. I, sec. 7, "capital or infamous crime(s)."
15. Const., 1894, Art. I, sec. 6, "capital or otherwise infamous crime(s)."
16. Const., 1851 and 1912, Art. I, sec. 10, "capital or otherwise infamous crime(s)."
17. Const., 1842, Art. I, sec. 7, "capital or other infamous crime(s)."
18. Const., 1876, Art. I, sec. 10, i. e. "except in cases in which the punishment is by fine, or imprisonment otherwise than in the penitentiary."
19. Const., 1912, Art. II, sec. 30.
20. Const., 1879, Art. I, sec. 8.
21. Const., 1818, Art. I, sec. 9.
22. Const., 1890, Art. I, sec. 8.
23. Const., 1921, Art. I, sec. 9.
24. Const., 1875, Art. II, sec. 12, (Amendment of 1900).
25. Const., 1889, Art. III, sec. 8.
26. Const., 1864, Art. I, sec. 8, (Amendment of 1912).
27. Const., 1912, Art. II, sec. 14, (Amendment of 1925).
28. Const., 1907, Art. II, sec. 17.
29. Const., 1889, Art. VI, sec. 10.
30. Const., 1895, Art. I, sec. 13.
31. Const., 1889, Art. I, sec. 25.
32. Const., 1851, Art. VII, sec. 17.

mitting all public offenses except treason and murder to be prosecuted by affidavit.[33] In Florida the constitution provides for prosecution by indictment[34] but also authorizes, except in capital cases, prosecution by information in Escambia County and in any other counties for which the legislature may so provide.[35]. The constitutions of Colorado,[36] Nebraska,[37], North Dakota[38] and Wyoming[39] prohibit the use of the information in felony cases, with exceptions such as are set forth above, but empower the legislature to provide otherwise. The Iowa Constitution requires prosecution by indictment for all offenses where the punishment exceeds a fine of one hundred dollars or imprisonment for thirty days, but likewise authorizes the legislature to provide otherwise.[40]. In these five states statutes have been enacted authorizing prosecution by information in all cases where an indictment may be used.[41].

In Kansas,[42] Vermont[43] and Wisconsin,[44] statutes providing in effect that information and indictment shall be concurrent remedies have been held not to violate the respective constitutions, which as already pointed out contain no provision regarding the method of prosecution. The Michigan Constitution of 1835 contained the guarantee that "No person shall be held to answer for a criminal offense, unless on the presentment or indictment of a grand jury, except in cases of impeachment, or in cases cognizable by justices of the peace, or arising in the army or militia when in actual service in time of war or public danger." This was omitted in the Constitution of 1850. In 1859 the legislature authorized prosecution by information.[45] No case, in which the constitutionality of this legislation was questioned, was found. The Minnesota Constitution was amended in 1905 by substituting the guarantee, "No person shall be held to answer for a criminal offense without due process of law,"[46] for the following provision: "No person shall be held to answer for a criminal offense unless on the presentment or indictment of a Grand Jury, except in cases of impeachment or in cases cognizable by Justices of the Peace, or arising in the Army or Navy, or in the militia when in actual service in time of war or public danger." In the same year a statute was enacted authorizing prosecution by information.[47] This was interpreted by the Supreme Court as applying only to cases where the punishment is less than imprisonment for ten years and was held not to violate the constitutional provision set forth above.[48]

Maryland,[49] Massachusetts[50] and New Hampshire[51] have provisions in their bills of rights saying in substance that "no subject shall be deprived of his life, liberty or property but by the judgment of his peers, or by the law of the land." It has been decided in a Massachusetts case that this is a guarantee of prosecution by indictment for all crimes involving capital or infamous punishment.[52] There is strong intimation to the same effect in a Maryland case.[53] On the other hand, a New Hampshire case has an equally strong intimation to the contrary.[54] The Virginia Constitution guarantees to an accused person the right to demand the cause and nature of the accusation against him.[55] There is a strong dictum in a recent case that this guarantee does not preclude information as a form of accusation.[56] The Supreme Court of Georgia has decided that the "trial by jury" provision of the constitution[57] does not require misdemeanor cases to be prosecuted by indictment and the language of the opinion is broad enough to cover all cases.[58]

In most of the states where a substantial use of the information is permitted, it is required either by constitution or statute that a preliminary examination be had or waived before an information may be filed. About half of these states limit this requirement to felony cases; in the others it applies to all cases where prosecution may be by information. In Connecticut,[59] Florida,[60] Iowa,[61] Louisiana,[62] Vermont[63] and Washington[64] it is not necessary that there be a preliminary examination of the accused before an information is filed; nor in Indiana before an affidavit is filed.[65] In Iowa, however, the prosecuting attorney must obtain the consent of the trial judge.[66]

A question arises in the states which require a preliminary examination, whether it is essential to the right to file an information that the accused be held to answer by the magistrate. California,[67] Idaho,[68], Kansas,[69] Michigan,[70] Oklahoma,[71] Utah,[72] Wisconsin,[73] and Wyoming[74] forbid the filing of an information if the accused has been discharged. In Colorado[75] and Nevada,[76] if the accused has been discharged, "the district attorney may upon affidavit of any person who has knowledge of the commission of an offense, and who is a competent witness to testify in the case, setting forth the offense and the name of the person or persons charged with the commission thereof, upon being furnished with the names of the witnesses for the prosecution, by leave of court first had, file an information, and process shall issue thereon." These two states also

33. Burns Stat., 1926, sec. 2150.
34. Const., 1885, Dec. of Rights, sec. 10.
35. Ib., Art. V, secs. 24, 25, 28.
36. Const., 1876, Art. II, sec. 8.
37. Const., 1875, Art. I, sec. 10.
38. Const., 1889, Art. I, sec. 8.
39. Const., 1889, Art. I, sec. 13.
40. Const., 1857, Art. I, sec. 11; Art. V, sec. 15.
41. Colorado—Comp. Laws, 1921, sec. 7069; Iowa—Code, 1924, sec. 13644; Nebraska—Comp. Stat., 1922, sec. 10086; North Dakota—Comp. Laws, 1913, secs. 10625, 10628; Wyoming—Comp. Stat., 1920, sec. 7425.
42. State v. Whisner, 35 Kan. 271, 277 (semble).
43. State v. Stimson, 78 Vt. 124. The Vermont statute provides for prosecution by information only in cases where the punishment for the offense is not death or imprisonment for life.
44. Rowan v. State, 30 Wis. 129.
45. Session Laws, 1859, No. 138, sec. 1.
46. Const., 1857, Art. I, sec. 7. (Amendment of 1905).
47. Session Laws, 1905, ch. 231, sec. 1.
48. State v. Keeney, 153 Minn. 153.
49. Const., 1867, Dec. of Rights, Art. 23.
50. Const., 1780, Part First, Art. XII.
51. Const., 1912, Part First, Art. 15.
52. Jones v. Robbins, 8 Gray 329, 342.
53. Danner v. State, 89 Md. 220, 227.
54. State v. Saunders, 66 N. H. 39, 87.
55. Const., 1902, Art. I, sec. 8.
56. Pine v. Commonwealth, 121 Va. 812, 834.
57. Const., 1877, Art. VI, Sec. XVIII, Par. I.
58. Gordon v. State, 102 Ga. 673, 676, 680.
59. Gen. Stat., 1918, sec. 6608.
60. Rev. Gen. Stat., 1920, sec. 6058.
61. Code, 1924, sec. 13644.
62. Const., 1921, Art. I, sec. 9.
63. Gen. Laws, 1917, sec. 2507.
64. Rem. Comp. Stat., 1922, sec. 2023.
65. Burns Stat., 1926, sec. 2150.
66. Code, 1924, sec. 13650.
67. Const., 1879, Art. I, sec. 8.
68. Const., 1890, Art. I, sec. 8.
69. Rev. Stat., 1923, sec. 62-805 as interpreted in State v. Goetz, 65 Kan. 125.
70. Pub. Acts, 1927, No. 175, ch. VII, sec. 42, as interpreted in Morrissey v. People, 11 Mich. 327, 341, and in People v. Evans, 72 Mich. 367, 387.
71. Const., 1907, Art. II, sec. 17, as interpreted in Muldrow v. State, 16 Okla. Cr. 549, 554.
72. Const., 1895, Art. I, sec. 13.
73. Stat., 1925, secs. 355.18, 355.20 (inferentially).
74. Comp. Stat., 1920, sec. 7431.
75. Comp. Laws, 1921, sec. 7076 and "also if a preliminary examination has not been had."
76. Rev. Laws, 1919, Vol. 3, p. 3401, sec. 9.

have statutes,[77] as do Kansas[78] and Wyoming,[79] which authorize the judge of the court having jurisdiction of the case, upon affidavit filed with him of the commission of an offense, to direct the filing of an information by the district attorney. The Missouri statute makes it the duty of the prosecuting attorney to file an information upon affidavit filed by "any person."[80] The language of these statutes is general and applies as well to cases where the accused was discharged at the preliminary examination as to cases where he was held to answer. In New York the Appellate Division of the Supreme Court upheld, under a statute authorizing prosecution by information in the Courts of Special Sessions, an information which was filed after the accused was discharged at the preliminary examination,[81] and there is a dictum by the Supreme Court of Missouri that such discharge is no bar to prosecution by information.[82] The constitutions or statutes of Arizona,[83] Minnesota,[84] Nebraska,[85] New Mexico[86] and South Dakota[87] simply require a precedent preliminary examination and no cases were found indicating the effect of discharging the accused.

For the purpose of determining the effectiveness of the practice in states where indictable offenses may be prosecuted by information the following questions were addressed to judges and practitioners in these states:[88]

1. To what extent, in a general way, is the information used for prosecuting felonies and misdemeanors?

2. Are relatively fewer informations quashed than indictments

3. Are you aware of any legal proceedings being taken against any prosecuting attorney for misconduct in filing or not filing informations?

4. Is there any difference in the relative number of convictions where information or indictment is used?

5. Is there any dissatisfaction with the practice of prosecuting by information, and if so, what are the reasons for such dissatisfaction?

(1) The answers to the first question disclosed the fact that, with the exception of one state, the information is used to a large extent in prosecuting both felonies and misdemeanors. The expressions used in the answers were: "almost universally," "almost exclusively," "in practically all, if not all cases," "practically all," "almost without exception," "almost entirely," "more than 97%," "98%," and "about 99%." With regard to the practice in one state, it was said: "Indictments in such cases are unknown, the indictment having been resorted to in only a few instances where it was necessary on account of the policies of other states to seek extradition."

(2) The answers from ten states were to the effect that fewer informations are quashed than indictments. With regard to the other states, it was said either that there was no difference or that so few indictments were used that it was impossible to form a comparison. In no state was it said that fewer indictments are quashed than informations.

(3) The answers to the third question were almost all in the negative. Two cases where such proceedings were taken were reported from different states. Following are the other answers where a clear-cut negation was not made:

(a) "Occasionally, but not often, in this state legal proceedings have been taken against a county attorney for misconduct in filing informations or for misconduct in failing to file informations."

(b) "Of course, you must understand that from time to time in some counties complaint will be made by someone, that a prosecutor is either too vigilant and industrious in filing informations, or on the other hand that he is too lax about the matter."

(c) "Yes, we have had some difficulty with prosecuting attorneys, usually because they have failed to prosecute. I think a good many complaints, perhaps, are filed with the Attorney General by people who wish to prosecute where the state's attorney refuses to do so. Of course, it is often a matter of sound discretion, and I think on the whole the abuses along this line are comparatively few."

(4) The answer to the fourth question from most states was either that there was no difference in the number of convictions where the prosecution was by information as compared with indictment, or that there was no basis for making a comparison by reason of the few cases in which an indictment was employed. In five states the answers indicated that there were more convictions where the prosecution was by information. Following is the answer from one state: "I am inclined to think the relative number of convictions under indictment is fewer than under informations. The reason for this, in my opinion, is that indictments are occasionally brought about by strong assertion of opinion on the part of a few who are vociferous, but who have not had experience in seeking to match the allegations with proof. Even in such cases indictments may sometimes serve a useful purpose in clearing the atmosphere of odors that may not be readily come at in any other way."

(5) In the answers to the fifth question, complete satisfaction with the practice of prosecuting by information was expressed with regard to all but six states. The following excerpts indicate the character and extent of the dissatisfaction in the six exceptional states:

(a) "Occasionally, we have some dissatisfaction on the part of wealthy complaining witnesses who feel that the grand jury should be used in their case in order to avoid any possible civil action for damage for malicious prosecution."

(b) "There may be, however, some isolated cases of dissatisfaction among persons who have either been prosecuted on information, or who have

77. Colorado—Comp. Laws, 1921, sec. 7077, "in extreme cases." Nevada—Rev. Laws, 1919, Vol. III, p. 3401, sec. 10, "in extreme cases."
78. Rev. Stat., 1923, sec. 62-807, "in extreme cases."
79. Comp. Stat., 1920, sec. 7424, "or other satisfactory proof . . . of the commission of any crime or offense."
80. Rev. Stat., 1919, sec. 3850.
81. People v. Spier, 120 App. Div. 786.
82. State v. Pritchett, 219 Mo. 696, 709.
83. Const., 1912, Art. II, sec. 20.
84. Gen. Stat., 1923, sec. 10666.
85. Comp. Stat., 1922, sec. 10009.
86. Const., 1912, Art. II, sec. 14 (Amendment of 1935).
87. Rev. Code, 1919, sec. 4707.
88. See the interesting articles, Informations or Indictments in Felony Cases, by Justin Miller, in 8 Minn. Law Rev. 379 (1924), and The Trial Information in Iowa, by Rollin M. Perkins, 13 Iowa Law Rev. 264 (1928).

been unsuccessful in securing the filing of an information against someone."

(c) "About the only dissatisfaction experienced here is that occasionally a prosecuting officer refuses to do his duty as against his friend, but this is not a sufficient objection to offset the tremendous advantage that proceeding by information has over the cumbersome, expensive and tedious plan of proceeding by indictment."

(d) "I should be obliged to say that there is some dissatisfaction. It is not general nor widespread and is due in the main to the fact that the office of district attorney has been occupied very largely by young and inexperienced attorneys, except in the larger and more populous counties where the business on the civil side of the office is so important as to require the services of an able man. In almost every important criminal case coming from up state an experienced lawyer is appointed as an assistant prosecutor. There are two principal reasons for the selection of young men: first, and foremost, the desire to give him 'a chance' and second, the salaries are fixed so low that abler attorneys cannot from a financial standpoint afford to accept the office. There is some tendency for district attorneys to prosecute vigorously as a means to further political advancement. While there has been something of that in this state, it has been of insignificant proportions. Taking into account the very great powers which the district attorney has under our law, the office in the main has been wisely and fairly administered."

(e) "Of course, there will be an occasional abuse of this practice by some prosecuting officers, but I think the disadvantage of such prosecution are far outweighed by the advantages obtained by the less cumbersome method."

(f) "The only dissatisfaction is that, perhaps, the state's attorney should prosecute some cases where he does not do so. However, this is usually obviated where the matter is of any importance by application to the attorney general or by application to the court."

Following are some of the answers showing satisfaction with the practice:

(a) Prosecution by information is "more convenient, less expensive and in every way more satisfactory."

(b) "Charges by information supplement the inquisitorial power of grand juries; they afford a readier means by which crime may be prosecuted and materially lessen the cost of a grand jury. Neither system should be dispensed with."

(c) "There is no dissatisfaction with the practice of prosecution by information. Everyone takes this method for granted as the better method. In short, indictment is resorted to only in unusual or emergency cases. It is only resorted to when there is fear of official corruption or some widespread conditions need investigation. Its use seems to be growing rarer."

(d) "I know of no dissatisfaction with the practice of prosecuting by information, but on the contrary, the practice has been commended by observers. It is less cumbersome, more inexpensive and more prompt than the grand jury procedure."

(e) "The use of the information has almost wholly superseded the indictment. As a rule, I think it is only in cases where the state's attorney does not care to take the responsibility of initiating a prosecution, or in cases where it is necessary to call the witnesses before a grand jury in order to find out what they would probably swear to on a trial."

(f) "I think it safe to say that the profession and our people are practically unanimously in favor of prosecutions by information, though desiring to retain as part of our system prosecutions by indictment for use when some particular reason calls for that method of investigation."

From the answers to the inquiries and from other investigations it seemed to be clearly established that prosecution by information, while less expensive, is more expeditious and efficient than prosecution by indictment. At the same time convincing reasons appeared why the grand jury should be retained for investigating purposes and for certain exceptional situations.

Accordingly the following Chapter on Methods of Prosecution was drafted:

"SECTION 1. PROSECUTION BY INFORMATION OR INDICTMENT. **All public offenses heretofore required to be prosecuted by indictment may be prosecuted either by indictment or by information.**

"SECTION 2. WHEN GRAND JURY TO BE SUMMONED. **No grand jury shall be summoned to attend at any court except upon the order of a judge thereof when in his opinion public interest so demands, except that a grand jury shall be summoned at least once a year in each county.**

"SECTION 3. WHEN PROSECUTION MAY BE BY INFORMATION. **No information may be filed against any person, except a fugitive from justice, for any offense which may be punished by death or imprisonment in the penitentiary until such person shall have had or waived a preliminary examination. The fact that a preliminary examination was neither had nor waived shall in no case invalidate any information in any court unless the defendant shall object to such information because of such fact before pleading to the merits.**

"SECTION 4. RIGHT TO FILE INFORMATION WHEN ACCUSED DISCHARGED AT PRELIMINARY EXAMINATION. **If upon the preliminary examination the accused is discharged, an information may be filed against him only by leave of court.**

"SECTON 5. DUTY OF PROSECUTING ATTORNEY AFTER ACCUSED HELD TO ANSWER AT PRELIMINARY EXAMINATION. **Whenever an accused has been held to answer at a preliminary examination, whether he has been admitted to bail or committed to jail, the prosecuting attorney shall file an information charging the commission of an offense according to the evidence presented at such examination, unless after full consideration of the preliminary examination he shall determine that an information ought not to be filed, in which case he shall present to the court a written statement containing his reasons, and the facts on which they are based, for not filing an informtion. After full consideration of such statement and of the evidence filed in the case, the court, if it is of the opinion that further proceedings should be taken against the accused, shall direct the prosecuting attorney either to file the proper information and bring the case to trial, or to present the case to the grand jury, as the prosecuting attorney may determine."**

In order that the provisions of this chapter, when enacted, may be upheld on constitutional grounds it will be necessary to amend the constitutions of certain states. It was accordingly recommended that the existing constitutional provisions, which prohibit the use of the information except

for minor offenses or in a few unusual cases be repealed in Alabama, Arkansas, Delaware, Illinois, Kentucky, Maine, Mississippi, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas and West Virginia, and that the following two provisions be added as amendments to the constitutions of these states:

The legislature may provide that public offenses heretofore required to be prosecuted by indictment may be prosecuted by information.

The legislature may modify the grand jury system.

As the requirement of the Maryland and Massachusetts constitutions that "no subject shall be deprived of his life, liberty or property but by the judgment of his peers, or by the law of the land" has been interpreted to preclude prosecution by information it was also recommended that their constitutions be amended by adding the above proposals.

As the courts of Georgia, New Hampshire and Virginia have intimated that prosecution by information is permitted by their respective constitutions the proposed statute may be enacted in these states without constitutional amendment. In Minnesota the constitution permits prosecution by information. However, the statute, as interpreted, limits it to offenses not punishable by death or imprisonment for more than ten years. As the proposed chapter has a wider application it was recommended that it be enacted in Minnesota.

In Arizona, California, Colorado, Connecticut (except for offenses punishable by death or imprisonment for life), Idaho, Iowa, Kansas, Louisiana (except capital cases), Michigan, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, Vermont (like Connecticut), Washington, Wisconsin and Wyoming the existing law, as already pointed out, provides for prosecution by information. The inquiries made in these states establish the fact that this method of prosecution is thoroughly satisfactory. Accordingly, although the details of procedure in these states vary somewhat from the plan here proposed, it was not recommended that any change be made.

In Florida the constitution provides that prosecution of felonies shall be by indictment but that in the County of Escambia and in such other counties as the legislature may deem expedient after application of a majority of the taxpayers, criminal courts of record shall be established which shall have jurisdiction of all but capital cases, and that prosecution in these courts shall be by information. Similar courts of record have been established by the legislature in seven other counties. As it is altogether unlikely that this provision of the Florida Constitution will be repealed in order to substitute another provision relating to prosecution by information, no recommendation for change in this state was made.

In Indiana all offenses except treason and murder may be prosecuted by affidavit. As the practice in that state is satisfactory, no change was recommended.

JURISPRUDENCE CONSTANTE AND STARE DECISIS CONTRASTED

Comparative Simplicity, Certainty and Adaptability of Civil Law Due to Codes and Restricted Scope of Jurisprudence Constante—Complexity, Confusion and Rigidity of Common Law Due to Its Unrestricted Adherence to Doctrine of Stare Decisis

By Hon. Robert L. Henry
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THE doctrines of Jurisprudence Constante in the Civil Law and of Stare Decisis in the Common Law look much alike, but the difference between them is such that it is one of the chief things which distinguishes the two great systems of the law. It is intimately connected both as to cause and effect with the differences in spirit and in technique; and in large measure accounts for the differences in simplicity and certainty in the law, and of flexibility in its application.

The Civil Law begins with the principle that precedents are not binding. Then it makes exceptions where the matter is jurisprudence constante. Obviously if the exceptions were very numerous the situation would approximate that in which the Common Law finds itself under the rule of stare decisis.

The impression one may easily get upon even a serious investigation of Civil Law practice is precisely that there is a tendency more and more to adopt the attitude and technique of the Common Law in the matter of precedents. One finds printed reports of judicial decisions, codes annotated by cases, treatises citing them, lawyers referring to them in arguments, and even judgments mentioning them.

But from my own experience in the actual application of the Civil Law, including of course

my observation of the work of counsel before the court, I have come to realize that such indicia may be misleading. It is clear that the divergence in attitude as to precedents between the Civil Law and the Common is still great, and that there is little likelihood of its becoming substantially less for a long time to come. And if eventually such difference is destined to disappear, I have come to entertain the hope that it will be by the Common Law moving in the direction of the Civil, instead of the movement continuing in the opposite direction, for the Civil Law attitude appears the saner, and produces better results.

There is a well-nigh insuperable difficulty in the way of the Common Law giving up even in a measure its adherence to precedents, good, bad and indifferent. It lies in the absence of codes or any official source of the law. Without such, there is no authoritative source other than the cases. Possibly the restatement of the law now being done by the American Law Institute may in one way or another acquire such overwhelming authority, that individual decisions even of courts of last resort will lose much of their present force. If so, there will be some hope for the Common Law in this most important matter.

It need hardly be pointed out that it is impossible for codes and the doctrine of stare decisis to exist together even for a moment without the process of destruction of the former setting in. As long as judgments continue to be the last word, it would be almost useless to adopt codes. They would be whittled away by interpretation, and in the course of a not very long time, the situation would again be what it is now, in Common Law countries, one in which the law would have to be sought in the cases.

And will not that be the result as to the labors of the American Law Institute also, unless some curb is put on the traditional Common Law attitude towards precedents?

Napoleon at the beginning of his Civil Code put in a provision forbidding judges from laying down any general rule of law. And such is the spirit and the general practice today in all Civil Law countries. It is not considered to be the business of judges to make law; their task is to apply it to the specific cases brought before them. It follows that they should not formulate rules of law in their own words. That has been authoritatively done, once and for all, by the codes. Neither should they be influenced in their decisions by what other judges have held upon similar facts, for the others may have been wrong, and it is not desirable that errors should be repeated. The result is that the application of law does not give rise itself to new rules of law. Only in such a way can code law be preserved.

The codes are supposed to contain the whole of the law, and such theory is by no means so far from truth as a Common Law legist might suppose. In actual practice certainly 99 per cent of the cases coming before the courts are disposed of by the broad general principles to be found in the codes.

At once, therefore, the field is narrowed as to which resort must be had to other sources. Then add to that the usual code provision that in the case of silence, insufficiency or obscurity of the law, the judge shall decide in conformity with the principles of natural law and equity, and one can see that he may do his duty as envisaged by the codes without taking precedents into consideration at all.

Such a conception of law is foreign to the Common Law legist. He is accustomed to look at the law as something very complex, as consisting of endless rules, to be sought in reports of cases as numerous as the sands of the sea. And the Common Law is, in fact, complex because of the doctrine that specific applications of the law themselves constitute law.

The Civil Law not having the general doctrine that applied law makes law, does succeed in solving nearly all of the problems presented to the courts by the application of general principles, apparently to the satisfaction of all concerned.

There are, however, decisions not made on the basis of general principles alone. Every now and then a problem of frequent recurrence gives difficulty. Some judges may have solved it one way and some another. It is important that the matter should be settled once and for all, so that lawyers will know how to advise their clients, and so that the latter will know how to act. The court of last resort after a full consideration may decide it one way or the other. Or it more frequently happens, that instead of the matter being proceeded with in such a deliberate way, the highest court, perhaps after some wavering itself, decides the same way on the problem a number of different times. In either case the matter is well settled for a generation. It is not likely that the court will for awhile, at any rate as long as it has the same personnel, go back on its own well considered decison or its established practice.

Under such conditions the judge of a lower court must, of course, conform, even if he does not agree with the correctness of the decision above, for it would not be right to cause litigants useless appeals. In each case where jurisprudence constante is urged upon him by counsel, he must, if he disagrees with the results obtained above, size up the situation. Was a case cited carefully considered, as shown by the arguments in the opinion? If not, even though recent, there is always a chance that in the case at hand the upper court may be influenced by the arguments of the judge below and will decide the matter differently the next time it gets to them. If the case cited was decided a long time ago and no recent judgment has confirmed it, it need ordinarily not be given much weight. For one case does not usually establish a practice. It might conceivably have been such a prominent one that business men or the public in general had heard about it and had conformed to its ruling. If that can be shown, it should not be upset; for, the reason why the courts follow their own precedents in certain cases is precisely in order not to unsettle the public, who are presumed to know of a well established court practice.

A claim for virtue in the doctrine of stare decisis is based on the theory that it gives fixity. The man in the street learning that a court has decided a certain way on a given state of facts is assured that upon a similar situation being brought before the court later the decision will be the same. But is the public as a matter of fact kept fully informed as to all court decisions? It is not infre-

quently said of the Common Law that at present no lawyer is master of it and few lawyers of even one branch of it.[1] What of the public that has something else to do? Can it be expected to know the rulings in hundreds of thousands of cases. And can what it doesn't know about be of any use as a guide?

Is it not, therefore, much more reasonable to confine the following of precedents to a comparatively few matters, those so well established that it is not unreasonable to suppose that they are known? That is precisely what the Civil Law does.

The Common Law under the régime of stare decisis attempts to fix everything. But is it much of a satisfaction after one has gotten into trouble to be assured that probably somewhere among the myriad cases there is one that settles the law for the matter in hand? There may be fixity, to be sure (i. e., where there is no confusion or conflicts among the precedents), but that does not mean there is no uncertainty from the point of view of the public. Or even for lawyers, at least, until after they have made thorough researches.

It is a satisfactory feeling for all concerned to believe, as is done in Civil Law countries, that the law is simple and certain: that it consists of a few general principles, with which all the world is more or less familiar, at least, sufficiently so to keep out of trouble under all ordinary circumstances; and that such principles in case of need may be found stated in a couple of little books, the codes.

Such a feeling does not engender the belief that lawyers are unnecessary until one gets into difficulty. Situations of such complexity arise from time to time that the help of a well trained mind to think them through is highly desirable, even though the principles of the law itself may appear simple, clear, and above dispute.

The complexity of the Common Law and its consequent unknowability, on the other hand, are apt to produce the feeling that the situation is most unjust, one in which a person may suffer the consequences of an ignorance for which he can in no way be blamed. That may induce the individual in important matters to get such light as he can from a lawyer to avoid getting into trouble, but when trouble comes to the average person, he endeavors to keep out of the hands of lawyers and courts as long as possible.

But not only to the layman in Civil Law countries does the matter look different. The lawyer and the judge are profoundly affected in thought and work, by the different attitude as to precedents. The former need not spend his life reading reports. He can give his best efforts where they are most needed, i. e., to a mastery of the facts of the case in hand. The latter also need not weary himself with reading and discussing innumerable other judgments. He can enjoy the pleasure of doing his own thinking, and of relying on himself alone, with such help as counsel may give, to make a correct application of undisputed law. He need cite no precedent in support of his judgment. It is bad form to do so. He does not lean on others, but justifies his decision by his own reasoning.

The Civil Law judge, of first instance, basing my opinion on my own experience, is reversed on the law on appeal in a far smaller percentage of cases than is the judge in a similar position in Common Law jurisdictions. That, I interpret as being due in large measure to its being easier to be right when principle is applied than when it is necessary to find one's way in a forest of precedents.

The citing of precedents by civilian bar or bench can ordinarily serve no useful purpose. If rightly decided, a precedent adds nothing; the judge to verify its correctness must test it on principle; if wrongly, why trouble to point it out and thus be unnecessarily discourteous to another court.

Mistakes are no doubt made, as judges are human, but that is not a reason for them to be repeated. They are mistakes not as to the law, but as to its application in particular instances. The law itself remains simple and certain.

Under the Common Law régime, on the other hand, mistakes accumulate from generation to generation and are slavishly followed. Innumerable distinctions and exceptions, many of them without *raisons d'être*, creep in. Conflicts appear at many points. So there is complexity and confusion.

The Civil Law may be likened to a tree in winter. The trunk, limbs, and branches are the principles laid down in the codes. Some twigs are added by the doctrine of jurisprudence constante. The Common Law is like a tree in summer. The leaves represent the cases. They are so numerous and confused in pattern that no branches or limbs of any kind can be seen, or traced with certainty.

The Common Law also by the same process by which it has become complex, has become rigid. It is a mistake to suppose, on the other hand, as is sometimes done, that codes make rigid law. That shows a lack of understanding of what a code is. It is not statute law, but a body of general principles of such universal applicability that there is little need of change, in the course of time, in the principles themselves. Most of those laid down in Justinian's Digest are suitable for modern France. But the application of them to the details of life should operate freely from generation to generation, and be adaptable to changing conditions and social ideas. That is not prevented by jurisprudence constante, but it is by stare decisis. Under the latter a development once attained remains inflexible.

Thus it is that the Civil Law is the more simple, certain, and adaptable, the Common Law the more complex, confused and rigid.

(1) e. g. William W. Cook in May 1927 Am. Bar Ass. Journal.

Roster of Patent Section Membership

A complete roster of members of the Section of Patent, Trademark and Copyright Law is being compiled and printed and will be available in pamphlet form on or about January 1, 1929, upon application to the Secretary of the Association, 209 South La Salle Street, Chicago, Illinois, or to William E. Dyre, Secretary of the Section, 707 McLachlen Building, Washington, D. C.

VALUATIONS FOR INCOME TAX PURPOSES

Importance of Valuations to Taxpayers and to Government—Subject Still Presents Many Uncertainties—Function of Valuations—General Principles—Real Estate and Mineral Properties—Herbert Hoover's Contribution to Subject—Valuation of Intangibles—Leases—Stock in Closely Held Corporations—General Tendencies*

By Arthur A. Ballantine
Member of the New York Bar

THE Federal income tax is not a property tax but valuations of property often enter largely into the determination of the amount of the tax. As to what was the value on some earlier date of any property not the subject of market transactions there is usually wide difference of opinion. How great may be the consequences of such differences is shown by the notable case of the Ford stock valuation. That case turned wholly on the value of stock in the Ford Motor Company on March 1, 1913, and the aggregate additional tax demanded by the Treasury as a result of taking a much lower value for the stock as of March 1, 1913, than that originally allowed, exceeded $40,000,000. The Board of Tax Appeals after hearing a mass of testimony in general sustained the contentions of the taxpayer.

What is the measure of value of property, particularly as of some date years before the valuation is made, when actual market transactions afford little guide? How can such wide difference of opinion exist? How can they be resolved? These questions are of the utmost importance to taxpayers and to the Government. They challenge the ability of those concerned in tax cases. Valuation questions are old, and it can hardly be said that the rulings of the Treasury and the decisions in tax cases show principles or formulae or methods of approach that are new. They show rather that the matter of valuation still presents engaging uncertainties. These rulings and decisions are too numerous and complicated for anything more than summary treatment in this short address.[1]

Function of Valuations

When do valuations enter into the determination of income and hence of the amount of the income tax?

The most frequent case is that of determining the gain or loss on the sale of property, as in the Ford case. Owners of Ford stock sold it in 1919 for an aggregate price exceeding $100,000,000. The Revenue Act of 1918, like the present Act, provides that the gain is to be reckoned by deducting from the amount received the cost of the stock or "its fair market price or value on March 1, 1913," whichever is higher. March 1, 1913, the day succeeding the taking effect of the income tax amendment, has been accepted in general as a date for the capitalization of what the taxpayer had; his taxable gains from realizations are limited to what exceeds this capital value on that date. Property received by gift before January 1, 1921, and sometimes in other connections, may be similarly capitalized in this case as of the date of receipt. In the case of acquisitions since the capital date the base taken is usually cost and no valuation question is presented.

Certain permitted deductions, often of much importance, may be reckoned on the basis of a valuation of property as of an earlier date, usually again March 1, 1913. These deductions include "reasonable allowance for exhaustion, wear and tear including. . . obsolescence" of property used in the trade or business. The property involved may be plant and machinery in the case of depreciation, and also, in the case of exhaustion which is allowed when the property has a limited life in the business—patents, leases, contracts and perhaps goodwill, where the life of the business becomes limited. As to goodwill, there has now been an adverse court decision and there is a controversy. Obviously property of this general nature is often difficult to value.

Another important deduction which has been and is often similarly based is that of a "reasonable allowance for depletion" in the case of mineral properties and timber. Oil and gas depletion so based in earlier years is now generally on the basis of a fixed percentage of income. The reckoning of depletion deductions has involved the valuation of the greater part of the mineral and oil resources of this country as of March 1, 1913, and in some cases as of other dates: a matter of great difficulty and productive of wide differences of opinion.

Valuation is necessary in other connections. In the determination of invested capital involving the value of property paid in for stock it has great importance. Whenever property other than money is received by the taxpayer by way of compensation, or as the result of any closed transaction, that property is to be valued as of the date of receipt.

General Principles of Valuation

What then is the value of any property for the purposes of the tax reckoning? If the property was of a sort extensively bought and sold in the market as of about the time of the basic date, like wheat or shares in the United States Steel Corporation, the value to be assigned to it is, in general, the actual market price.

Suppose, however, the property was not dealt in in any market—what then was its value? It is not *cost*, though that may be evidence, and information as to cost is rigidly insisted on by the Treasury—probably too rigidly. It is not *book value:* that may have little real bearing and neither the taxpayer nor the Government is bound by it, though again it may be some evidence.

1. See Commerce Clearing House Standard Federal Tax Service (1928) Volume I, pp. 89-91.

*Address delivered before the Association of the Bar of the City of New York on Nov. 9, 1928.

It is not something to be found in the light of some ulterior purpose of the valuation, as value for rate making purposes in the case of public utilities valuations. No, value under the income tax law has been recognized to be purely market value, even where there was in fact no actual market transaction. Value is what the valuer thinks would have been the price in a purely business transaction between a willing buyer and a willing seller.

This business idea of value was not always fully recognized by the Treasury but is now firmly established. As the Board of Tax Appeals stated in setting forth the basis of its decision in the very able opinion in the Ford case:

"It has been said that value is the price at which a willing seller and a willing buyer would agree to trade if both were aware of the facts."[2]

In a later case the Board amplified this:

"We must postulate the existence of a willing seller and a willing and able buyer, both familiar with the situation, reasonable in their views, acting for their own best interests and each willing to make such adjustments in his views upon value as might be necessary to bring about a sale at a reasonble amount, fair to both parties."[3]

How does the application of this rather psychological concept result in a figure? We can summon in imagination these hypothetical parties to a theoretical transaction; how do we make them answer? Obviously, there is no actual answer from these sources, and more than one theoretical answer may almost always be assumed and defended. The adequacy with which the material facts are perceived and collected and the force of the reasoning assigning weight to pertinent factors are what make one valuation more persuasive than another. The test not being mechanical, the method of dealing with the material in any particular case is of greatest interest.

How do we go at the problem? In the Ford opinion, the Board put the first step as follows:

"We have sought to place ourselves, on March 1, 1913—recognizing all the facts in existence or in contemplation on that date as shown by the evidence, and from them attempting reasonably to predict those to come, being neither unduly skeptical nor unduly optimistic . . ."

But having taken this step, is there any rule for assigning the different factors the weight that they should have in getting at a figure? On this point the Board said:

"The method of valuation is in itself unimportant, so long as it gives due regard to all the facts and relevant evidence, and results in a value which has a reasonable relation thereto. There may be no slavish adherence to a formula (quoting Supreme Court decisions)."

"Obviously it is impractical to assign to any fact a precise weight or to define its relative emphasis or importance."

With such latitude for differences in any particular valuation as exists under the Board's opinions,—and these are in harmony with court decisions[4]—it is necessary to examine what kind of facts have to be assembled in a particular valuation case, and what reasoning is likely to be acceptable in drawing conclusions. This can be taken up by dealing briefly with valuation of some different type of property.

Real Estate

Take the case of a piece of unimproved real estate owned on March 1, 1913. First, we would require a very exact description. We are assuming that there were no market transactions in similar lands at the time of the basic date which afford a criterion but this subject must be thoroughly canvassed. Evidence of cost the Treasury always requires. Assessed valuation is also inquired into although whether it is admissible before the Board is doubtful. Then we require all facts affecting the use and future of the property: as to the character and tendency of the neighborhood; pending improvements or adverse developments; suitability for special uses. But when all such facts are carefully assembled, there is in this case no way to reach a valuation except through testimony of experts or dealers in real estate, based on their knowledge of the particular property and general experience and knowledge of material conditions. That such testimony from competent persons would be admitted is now established. The Board is not obliged to accept such testimony, however, and the actual outcome depends largely on the degree of knowledge and experience of the witness and the fairness of his attitude toward the facts. Such a valuation case is difficult because of the lack of concrete relation between the facts and any figure. Notwithstanding the latitude allowed in valuation methods, we shall find that methods are favored which permit the use of figures standing in some definite relation to the final result.

Figures can enter in more largely when dealing with plant and facilities, such as buildings, machinery, and the like. Here original cost less proper allowance for sustained depreciation is likely to stand as the basis unless the taxpayer can show some marked change, such as a sharp difference in the price level making the plant worth more as of the basic date. To get at this we turn to the cost of replacement as of the basic date. Replacement cost has to be determined by engineering or architectural appraisers. Such appraisals must show a careful determination of all the factors entering into cost, correct unit prices, and a proper allowance for depreciation must be established usually by supplementary testimony of witnesses familiar with the plant. For a time the Treasury was inclined not to accept such retrospective appraisals even when most competently made and presented in comparison with original cost. The conclusion was finally reached by higher authority in the Bureau that

"The Bureau must receive and consider such appraisals, therefore, with a sound and intelligent discretion as it considers much other evidence, and be content to accept them, without being able to prove their accuracy, if they convince the mind of their correctness to that moral certainty upon which practical men of affairs act."[5]

The officers of the Bureau were cautioned to check the appraisals carefully but

"to receive such proof of the facts as is ordinarily accepted in important business transactions of like character."

Convincing demonstration by retroactive appraisal however, that on the basic date reproduction cost less depreciation was much more than original cost, does not mean that the higher figure would be accepted. It is recognized that "value is what the property is worth." If the business for which the plant was de-

2. *Couzens v. Commissioner of Internal Revenue*, 11 B. T. A. 1040, 1162.

3. *Oahu Sugar Co., Ltd., v. Commissioner of Internal Revenue*, Opinion Promulgated by Board of Tax Appeals Sept. 19, 1928.

4. *Georgia Railway v. Railroad Commission*, 262 U. S. 625.
McCardle v. Indianapolis Water Works Co., 277 U. S. 40.
Walter v. Duffy, 287 Fed. 47.
Heiner v. Crosby, 24 Fed. (2d) 191.

5. *A. R. R.* 747, I-1 C. B. 353.

signed was very bad or had become prohibited the plant might have only salvage value. If the plant had been poorly designed or after its construction plants had been worked out with better design, it might not have been worth reproduction cost. These considerations are recognized and the retrospective appraisal has to be supplemented by competent testimony establishing that the figure reached is in harmony with all business facts.

Mineral Properties

A company owned on March 1, 1913, a vast copper deposit only partially developed and explored. It is entitled to deduct something from the receipts for each pound of copper mined and sold to offset the depletion of capital value. No similar properties were bought and sold on the basic date. How is the value of the property to be determined?

At first the Treasury thought this could be done by adding together the market value of the stock, bonds, and other obligations of the Company, and deducting from the total the amount of the tangible assets. It was speedily shown, however, that the value of the mining property as such and the value of the stock and other securities had no fixed relation. The dealings in the stock might be small and the purchasers and sellers had no real knowledge of the property. Stock market values were recognized to be frequently of little, if any, weight in determining the market value of the property owned by the corporation, though sometimes useful as a check.

Other more or less accidental criteria were turned to: the valuation for local or state taxation, records in litigation, and the like. Some stress was laid on the value put on the property by the taxpayer in capital stock tax returns. So much doubt existed as to the basis of that tax that such figures as were given had little bearing and were at the most subject to being overcome by proof. These accidental indications were found to give little guidance in most cases. Here also the Treasury found itself obliged to resort to the basis for valuing mineral properties which intelligent business men had come to use, when possible, for determining values on which to base investment. The basis frequently employed by such business men is that of the analytical appraisal. Stated in the Regulations as a method not to be used if the fair market value can reasonably be determined in any other way, the analytical appraisal has nevertheless been the basis and still is the basis for most mining property valuations.

The analytical appraisal basis was given its modern form in large part by the treatise of Mr. Herbert Hoover, published in the course of his engineering work. It has been developed by other distinguished engineers; the mathematics are still the subject of discussion and lie beyond the field, if not indeed beyond the ken, of the lawyer.

The fundamental idea is to determine the whole profit which may reasonably be expected to be derived from the full exploitation of the property; to ascertain the period during which and the rate at which the profit will be received, and then by use of the proper interest factors, taking into account the element of risk, to ascertain mathematically the value of the prospective profits as of the basic date. The interest factors are used to give the value as of such date of the expected future increments of profit.

It will be seen that this process involves not only the most careful determination of the facts as to the particular property but also the projection into the future of the probable program of development of the cost of mining operations and the probable yield of the product. As shown by the Treasury Regulations, the appraiser must have as of the basic date:

> The total quantity of the mineral and of each particular kind of grade determined or estimated in some satisfactory manner.
>
> The percentage of the product to be recovered.
>
> The operating program, including the probable time for each development expenditure.
>
> The future operating cost.
>
> The expected price throughout the life of the mine.
>
> The basic rate of interest, commensurate with the risk for the particular deposit.[6]

All these factors are to be determined in the light of conditions and circumstances known at the basic date, regardless of later discoveries and developments, unless reasonably anticipated. Given these factors, a figure for the present value of the basic date can be determined by mathematical formula.

Clearly, there can be wide difference of opinion as to the actual facts entering into any such determination, as well as the many assumptions as to the future and as to proper interest factors. The determination of such questions demands the utmost care and cooperation between engineers, accountants and lawyers. A seemingly slight variation in a single factor may produce a startling difference in result.

It is not surprising that mineral property values have been the subject of acute controversies between taxpayers and the Treasury. What is surprising is rather that in most cases figures have finally been accepted by both sides as reasonably satisfactory. Through the industry of its personnel the Treasury has assembled a mass of information about mineral properties never before equalled and now makes its valuations in the light of such information and of long experience.

The same general appraisal method was applied to oil and gas. The facts in regard to these fugitive substances were too difficult to ascertain, and under recent laws depletion for such properties is ordinarily a fixed percentage of income rather than a return of an ascertained capital value. The valuation of timber properties as of the basic date is also allowed and is also the subject of much complication.

The Valuation of Intangibles

The method used for getting at the value of mineral properties—that is to determine the value as of the basic date of a flow of profits of limited duration—has been very extensively employed for valuing other types of property, such as goodwill, patents, leases, contracts, and the like. Here also we have the possibility of determining the reasonably expected future profits and their period of continuance and mathematically reducing this to value as of any desired date.

It was the 18th Amendment which first brought about this type of valuation strikingly before the Treasury. Distillers and brewers who owned businesses and brands that had been of great value, faced with the limitation and ultimate destruction of their businesses, claimed allowance for the exhaustion or loss of this value. The Treasury recognized the justice of this claim under the tax statutes and laid down tests of valuation.

One test was based on the difference in price between brand goods and other goods; another was the

6. *Articles* 206 *and* 207, *Regulations* 69.

recognized goodwill or brand value of established names which sometimes prevailed in purchases and sales. But the rule of more general application which came to be recognized was to take the average earnings of the business for a period of years before March 1, 1913, preferably not less than five years; to deduct from this average a return of say 10% on the average tangible assets (all assets employed in the business other than goodwill itself) and then capitalize the surplus earnings over and above such return on the tangibles at a rate originally stated to be generally 20%, or on a five-year purchase basis.[7]

It was soon recognized that expected future earnings as of the basic date could not be taken as a mere average of the actual earnings for previous years but should rest upon a careful examination of all factors upon which an intelligent purchaser would actually base an estimate for the future. It is also recognized that the return to be allowed on tangibles used in the business, as well as the proper rate for capitalizing the surplus earnings, depended on the situation of the particular business, its peculiar strength, weakness and prospects. The return on tangibles of from 6 to 8 percent, and capitalization rates for surplus earnings of from 10 to 15 percent have been regarded as appropriate in some cases.[8] In practice it has been found that whatever the result of the application of the formula, the value determined must meet the test of reasonableness. It can be seen that the use of this method of getting at intangible values offers ample ground for differences of opinion.

Patent valuations present similar factors and have been similarly met. In such cases the Bureau of Internal Revenue for a long period sought to confine the estimate of future returns from a patent to an average of the return for some period prior to the basic date. It took Tax Board decisions to gain real recognition of the soundness of the position that earnings for the past might be an inadequate guide as to the future, that the upward tendency of earnings, the increasing use of the patented article, and other factors might lead to a reasonable assumption of larger earnings, and that larger earnings actually obtained in periods after the basic date might be used to substantiate the estimates as of the basic date. In the leading case on patent value, the Board said:

"The number of years to be used over which the earnings should be averaged; the per cent to be attributed to tangible assets, and the basis of the capitalization of the remaining earnings are questions to be determined from all existing facts and circumstances. The period used should be as nearly representative as possible, so that the average earnings over it will reflect the true condition of the company.

"In this case, on account of all the facts and circumstances known at the time, neither the earnings prior to the acquisition of the assets by the taxpayer nor those subsequent taken alone would accurately reflect values existing when the corporation acquired them. The Commissioner recognized this fact and used a period prior to November 1, 1912, and a period subsequent thereto. The subsequent earnings could be, and were, reasonably anticipated. The earnings over a reasonable period after the acquisition of the patents and license agreements merely corroborated facts already known. In a court of law what is a reasonable period over which to average the earnings is a question of fact to be determined by the jury."[9]

In earlier years the Bureau sometimes permitted patent values to be computed as if the patent income would be permanent; now, however, the fact that the patent monopoly has a limited life is taken into account in determining the capital value as of the basic date.

Leases

A lease obtained by the taxpayer before March 1, 1913, may have had a large value as of that date. For some years the right to make a deduction for the exhaustion of that value, though originally denied, has been established. Sometimes the determination of the leasehold value is simple. The taxpayer can show through competent experts that what he would have had to pay under a new lease executed as of the basic date would have been say $50,000 a year more than under the existing lease. The value as of March 1, 1913, of an annuity of $50,000 a year for the period of the lease may then be taken as the leasehold value.

The valuation of certain leases of sugar lands in the Territory of Hawaii indicates the wide variety of questions that may arise in this connection.[10] The leases in question, mainly for 40 years, had been obtained about 1890 and covered lands not then known to be suitable for growing sugar. Irrigation proved highly successful and on March 1, 1913, the leased lands had been yielding large profits for many years. The rental fixed before this development was clearly low. The petitioner claimed substantial value for the leases. The Government denied that the leases had any value whatever. The Government's position was based on the proposition that the prosperity of the Hawaiian sugar industry depended largely on the continuance of the United States tariff on sugars with Hawaiian sugar coming into the United States free of duty, and that the party which had just come into power on March 1, 1913, was likely to abolish or greatly reduce this tariff.

To this the taxpayer answered that the party in power would not be likely to actually permit or continue tariff changes destructive to their industry and to the United States beet sugar as well: that such tariff changes had not in fact been permitted to continue; that large owners of sugar plantations showed no tendency in 1913 to sell or abandon their properties; that the faith of some of these lessees was concretely demonstrated by their proceeding in 1912 and 1913, in the face of the threatened tariff change, with a new irrigation scheme at large cost. The lessees introduced evidence showing the history of the properties in detail, their operating prospects; submitted values based on earnings in which the return on tangibles was allowed at 8% and the surplus earnings were capitalized at 12%, and submitted testimony of business men and bankers as to the actual commercial value of the leases at the time. The board found that the tariff threat did not destroy the value of the leases, but assigned some weight to this adverse factor in determining the substantial value which it actually placed upon the leases.

Stock in Closely Held Corporations

The valuation of stock in closely held corporations may present many questions as to the value of particular classes of property. In most cases, however, the main question turns largely on the expected earnings.

7. *A. R. M.* 34, 2 C. B. 31.

8. *Appeal of Dwight & Lloyd Sintering Co.*, 1 B. T. A. 179; *Appeal of Central Consumers Wine & Liquor Co.*, 1 B. T. A. 1190; *Appeal of Jewelers Building Co.*, 2 B. T. A. 540; *Appeal of St. Louis Screw Co.*, 2 B. T. A. 649; *Appeal of J. J. Gray, Jr.*, 2 B. T. A. 672; *Owens Bottle Co. v. Commissioner of Internal Revenue*, 8 B. T. A. 1197.

9. *Appeal of Dwight & Lloyd Sintering Co.*, 1 B. T. A. 179.

10. *Oahu Sugar Co., Ltd. v. Commissioner of Internal Revenue.* Opinion Promulgated by Board of Tax Appeals, Sept. 19, 1928.

It was primarily on this basis that the Tax Board reached its decision in the Ford case.

The Ford case originated in a contention submitted to the Bureau of Internal Revenue that the value of the stock of the Ford Motor Company in 1913 was not to be determined as the Bureau had originally determined it by looking at the facts and circumstances as they existed in 1913, but could properly be determined only by reasoning back from the price at which the sale of some 41% of the stock was made in 1919. The Commissioner who considered the case originally fixed a value of about $9,500 a share, largely on the basis of the earnings and prospects of the corporation in 1913; on this basis assessed and received taxes aggregating upwards of $20,000,000 on the profit deemed to have resulted from the sale of the stock. Years after the sale it was urged upon the Bureau that the only way to determine the value of the stock in 1913, there having been no determinative market transactions, was this:

"Take the volume of business and the net earning power of the business in 1919 and see their relation to the 1919 selling price of the stock—then apply this index or ratio to the volume of business and net earning power in 1913. The result will be a stock value for 1913, which being directly related to the 1919 actual selling price by the same formula, will probably be not far off from the truth. If any corrections are required it will be simple to make them."

The selling price in 1919 is then found to be two and one-half times the 1919 earning power of $5,000 a share. On the same basis the 1913 earning power of $1,250 a share yielded a market value of $3,125 a share, but it was further concluded that adjustment should reduce this value to $2,500 a share. On substantially this basis of attempting to reach back from a sale in 1919 to a fair market value in 1913, the huge additional assessment of upwards of $40,000,000 was made.

The Board of Tax Appeals completely rejected this method. The Board held that the value of the stock as of March 1, 1913, was an absolute thing, not to be determined from a sale of the stock years later, but to be found in the light of all pertinent facts as they existed in 1913; the result to be checked in the light of later developments but not to be determined from them. Incidentally it stated that

"seemingly the stockholders in 1919 sold their stock for less than what a careful study would have shown to be the full value of their stock."

A mass of testimony was introduced as to the history of the Company, its methods of manufacture and of selling, its personnel, as to the automobile industry, its future, and as to the business future of the United States. Testimony as to the 1913 value of the stock ranged from $2,055.74 a share to $13,000 a share. As to this testimony the Board pertinently said:

"Nothing could better reveal the lack of a recognized standard for ascertaining value than this record. Opinions were as freely sought from and given by witnesses who could only give a categorical answer to the ultimate question of value with no supporting reasons for their opinions as those who had by a meticulous analysis assigned a relative weight or significance to each fact or assumption and arrived by mathematical processes at a figure of value. These witnesses included executive heads of automobile manufacturing corporations, accountants, engineers, economists, statisticians, bankers, brokers, and teachers. This testimony was all treated by counsel as expert testimony. The opinions were received in evidence in the light of the qualifications which the examinations of the witnesses disclosed. The conflict of opinion however and the diversity of reasoning by which such opinions were arrived at indicate that the problem of valuation of the common stock of a closely owned manufacturing corporation has not yet been developed so far that any particular method of reasoning in respect of it is authoritative or any particular class of persons may be recognized as experts. There is likewise no method of arriving at such value which so far as our research and the briefs of counsel show, has been established in the law as controlling. The facts and circumstances must be fully known in each case together with any available evidence of their interrelation and importance, and from this in its entirety the independent judgment of the Board must be derived."

While stating that there could be no slavish adherence to forumla, the Board said:

"The evidence throughout the proceeding indicates what would otherwise seem reasonably clear, that the primary data from which the value of this stock should be judged are those relating to the corporation's earnings, and especially those affecting the extent of earnings which might reasonably be expected in the future. . . . The conventional statistical studies covering five years preceding the date in question have no sanction *per se*, but only if, sensibly considered, they provide some index of the wealth to come. . . . Primarily, the earnings are the test of success of the past and the indication of the future. The other statistics of production, sales, etc.—and the description of the management and its methods and plans, serve to give depth and perspective to the earnings."

The Board found as a fact that earnings of not less than $25,000,000 a year were likely to continue for at least ten years and that the general tendency of earnings was markedly upward. On these facts, rejecting any exact formulae, including comparative studies of the Ford Company and other numerous industrial corporations from which it was attempted to deduce the market value of the Ford stock, the Board found the value of the stock as of March 1, 1913, to be $10,000 a share. This meant that the taxpayers had actually overpaid their taxes instead of having underpaid them. This figure for the value of the stock was in fact some eight times the earnings per share as determined by the Board, but the tendency of the earnings was clearly upward. This great case has done much to indicate the approach to valuation problems and the method of dealing with them.

General Tendencies

Consideration of the body of rulings and decisions on valuation in Federal tax cases, only briefly touched upon here, shows that in earlier years the Treasury was rather groping towards methods; it was rather ready to tie to rules of thumb, particularly when they kept values down and seemed to save labor.

In later years it has become established that methods to be employed must be those which business men use in practical affairs: expert opinions, engineering appraisals, analytical calculations can all be employed subject to proof of the use of proper factors and of the soundness of the method in the particular case.

The rigid use of formulae is not sanctioned: all methods and opinions are to be checked by reason and common sense and the particular result must appeal to the sound discretion of the tribunal. The factor of earnings is, however, undoubtedly the most important factor in most cases of difficulty.

That valuation has the best chances of acceptance which presents the facts with the greatest thoroughness, with greatest insight as to what facts are material, and with the clearest construction from the facts of a conclusion bearing the stamp of fairness.

Establishments in different cities where the Journal will be found on sale are given on page 48 of this issue.

THE TEACHING OF INTERNATIONAL LAW IN AMERICA

Circumstances Which Condition the Teaching of Any Subject—Periods Into Which History of International Law Teaching in This Country May Be Divided—"Professionalization" of International Law Needed Today—Importance of Study of Other Factors in International Relations, etc.*

By Manley O. Hudson
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THREE things seem to condition the teaching of any subject: (1) the stage of its development in thought and in action; (2) the nature and volume of the materials available for its exploration; and (3) the amount of interest manifested by students. When a stage of development has been reached where wide departures are in progress, when materials are at hand for analysis and speculation, and when the general interest of students has been enlisted, problems of teaching are certain to arise upon which teachers will not all agree. Questions as to the subject matter which should be taught, as to the people by whom and to whom it should be taught, and as to the value of the different methods which are in vogue, cannot be given final or dogmatic answers. But it is a part of the teacher's task to be continually asking such questions, and perhaps continually changing his answers to them, and one of the objects of these conferences is to enable us teachers to exchange and compare our answers.

In the two previous Conferences of Teachers of International Law and Related Subjects, much attention has been given to questions concerning the subject matter to be taught and the method of its teaching. Little has been said concerning the other question—by whom and to whom should international law be taught? I think we can very profitably ask ourselves, what is the place which should be given to international law in the professional training of lawyers and in the cultural training of citizens?

History of International Law Teaching in America

In approaching this question, it may be useful to pass in brief review the history of international law teaching in America. That history may be conveniently divided into five periods: (1) the period which marks the rise of American independence; (2) the period which marks the rise of the American law schools; (3) the period which marks the rise of an American literature of international law; (4) the period which marks the rise of the American casebooks; and (5) the period which marks the rise of international organization. In each of these periods, a distinctive task has confronted the teachers of international law. In each of them, the teachers made, or are making, a contribution to the development of our subject, and perhaps we shall be clearer in our analysis of our own problems if we may agree as to what these contributions have been in the four earlier periods.

(1) The first period in the history of international law teaching in America began with the independence of the United States. During the period of our colonial history, the subject was greatly neglected by the profession in England,[1] and little need for its study was felt in America. But the search for a natular law which would limit the power of a sovereign, led Americans into a study of continental writers, and the law of nations came into prominence in the beginning of the independence movement. As early as 1760, John Adams was lamenting that he had not read Grotius and Puffendorf,[2] but he had remedied that deficiency in his training when he wrote the Novanglus in 1774.[3] When the American colonies began to claim a place among the nations, new emphasis was placed on the law of nations. In 1777, President Stiles worked out a plan for a law professorship at Yale, which included instruction in the law of nations to "awe those into fidelity whom the States may entrust with public and important negotiations."[4] That plan was never put into effect, but we are told by Thomas Jefferson that in 1779 the subject of the law of nature and nations was added to the "duties of the moral professor" at William and Mary College.[5] Problems which arose during the war of the Revolution seem to have encouraged some interest in the law of nations,[6] but the inadequate treatment of the subject in the fourth book of Blackstone's Commentaries, then in vogue, gave little help to a student. Nor was much literature available in English, so that students were forced to depend upon the continental literature[7] for a study of which but few of them had the linguistic equipment. In 1781, James Kent was studying Grotius and Puffendorf; in 1788 John Quincy Adams was studying Vattel; in 1790 Thomas Jefferson was recommending a study of Vattel[8]; and before 1804 Daniel Webster had studied Vattel and Burlamaqui. Cobbett's translation of Martens' treatise, apparently the first book on the law of nations

*An address before the Third Conference of Teachers of International Law, Washington, D. C., April 25, 1928.

1. See Charles Warren, *History of the American Bar*, chap. 1 and chap. 7.
2. Charles Warren, *History of the Harvard Law School*, I, p. 187.
3. See John Adams, *Works*, vol. iv, pp. 79, 82.
4. Charles Warren, *History of the Harvard Law School*, I, p. 168.
5. *Ibid.*, p. 169. See also James F. Colby, *The Collegiate Study of Law*, Amer. Bar Association Reports, 1896, pp. 521, 524.
6. See the memoir of Theophilus Parsons, 10 Mass. 525; Jesse S. Reeves, *The Influence of the Law of Nature Upon International Law in the United States*, 3 American Journal of International Law, p. 547.
7. See Thomas W. Balch, *The Beginnings of International Law in the United States of America*, Publications of the Colonial Society of Massachusetts, vol. 20, p. 2; *The Common Place Book of Thomas Jefferson* (ed. by Chinard, 1926), pp. 368-374.
8. Thomas Jefferson, *Writings* (Ford's ed.), V, 161.

to be published in America,[9] was brought out at Philadelphia in 1795, and it was followed by an American edition of Vattel, published at New York in 1796. This was a period of the study, rather than of the teaching, of international law. But a considerable part of the lectures of James Wilson, begun at the College of Philadelphia in 1790, was devoted to the law of nations,[10] and in 1795 James Kent lectured on the subject at King's College.[11] Throughout the period, it was the continental writers who were studied,[12] and this explains the numerous citations of Vattel in our early court reports. Even with this limitation, however, the law of nations had a recognized place in the pursuit of a legal education, and it formed a part of the learning of many of the better-educated lawyers.

The Rise of the Law Schools

(2) A second period in the history of international law teaching in America began with the rise of the professional law schools during the first quarter of the nineteenth century. Little attention seems to have been given to the subject in the school at Litchfield, Connecticut[13]; but in 1821 the "law of nations" was one of the title in a syllabus of the lectures of David Hoffman at the University of Maryland,[14] and in 1823 Chancellor Kent delivered nine lectures on the law of nations at Columbia College which were included in the *Commentaries* published in 1826. When Joseph Story was inaugurated in the Dane Professorship at the Harvard Law School in 1829, he took the law of nations as one of his subjects,[15] and the publication of his *Commentaries on Conflict of Laws* in 1834 marks the first demarcation of private from public international law. In 1833, Charles Sumner edited a catalogue of the Harvard Law Library with entries of some fifty books on international law.[16] During this second period, our subject had a definite place in the curricula of the law schools, and several generations of lawyers learned international law from the commentaries of Blackstone and Kent. It seems doubtful whether the subject was much studied by those who were not preparing for the bar, but its close connection at that time with moral philosophy may have given it some place in college courses on philosophy.

The Rise of American Literature

(3) A third period in the history of international law teaching in American began with the rise of an American literature of international law. If the credit for the first systematic treatment of the subject must be given to Chancellor Kent,[17] as Dr. James Brown Scott has insisted,[18] it was the *Elements*[19] of Henry Wheaton which exercised the greatest influence on American thought. First published both at New York and London in 1836, successive editions kept fresh its hold on American students; and the excellence of Richard Henry Dana's notes to the eighth edition (1866) served to tighten the hold even into our own day. Other American treatises did not supplant Wheaton. In 1860, at Boston, President Theodore D. Woolsey published his *Introduction* which went through six editions, and in 1861, H. W. Halleck published his treatise at San Francisco. Wheaton, Woolsey and Halleck held the field until the appearance of the numerous treatises of more recent date; Pomeroy (1886), Davis (1887), Taylor (1901), Maxey (1906), Wilson (1910), Hershey (1912), Stockton (1914), Foulke (1920), Hyde (1922), and Fenwick (1924). Several English treatises, also, came into use in America during this period, among them Manning's *Commentaries* (1839), Polson's *Principles* (1848) and Wildman's *Institutes* (1849). Sir Robert Phillimore's *Commentaries* were published both at London and Philadelphia in 1854, and with Sir Travers Twiss' *Treatise* (1861), Creasey's *First Platform* (1876), Hall's *Treatise* (1880), and Lorimer's *Institutes* (1883), were often referred to in America. With so many treatises available, the teaching of international law was widely extended in this period. The subject ceased to be primarily a subject of professional study for intending lawyers, and it came into vogue as a part of the preparation of college students for the duties of citizenship. Professional law students began to find themselves overwhelmed by the development of private law, and even constitutional law was slow to gain an assured place in the professional curricula. Moreover, the law-teaching profession was recruited from the ranks of practitioners, few of whom had had experience with international law, and the system of law reports inaugurated in 1879 gave no special place to it. The result was that some prejudice against the subject grew up among those engaged in professional legal education, and it came to be taught chiefly in the colleges. In the days of Kent and Story, the chief contributions to the literature of international law came from the law schools; but in this period the product of the law schools was almost negligible.[20]

The Case System Period

(4) A fourth period in the history of international law teaching in America began with the rise of the case-books. Langdell inaugurated the case-system at the Harvard Law School in 1870, and in three decades it made its way into many other schools. But the law schools' neglect of international law postponed the use of the case system in teaching the subject. Pitt-Cobbett's collection of cases, published in London in 1885, shows little trace of the influence of Langdell. But soon afterward, Freeman Snow began to use the case-system in his classes in Harvard College, and in 1893 he published the first American case-book on international law. In 1902, Dr. James Brown Scott gave us his admirable collection, originally intended to be a revision of Snow's; and for a whole quarter of a century Scott's cases, revised in 1922, remained our

9. Though Nugent's translation of Burlamaqui, *Principles of Natural and Politic Law*, had been published at Boston in 1792.

10. See Wilson, *Works of James Wilson* (1804), I, c. iv.

11. Kent, *Dissertations* (1795), p. 51.

12. Ward's *Enquiry into the Foundation and History of the Law of Nations in Europe*, was published at Dublin in 1795. Some copies of it came to America, but it was never in very general use here.

13. See Simeon E. Baldwin, *James Gould*, 2 Lewis, Great American Lawyers, p. 46.

14. David Hoffman, *Syllabus of a Course of Lectures on Law* (Baltimore, 1821), p. 67.

15. Joseph Story, *Discourse* (1829), p. 41.

16. The Olivart Library of International Law in the Harvard Law Library now contains some twenty thousand volumes.

17. "The lectures of Chancellor Kent at the commencement of the Commentaries are a perfect specimen of juridical exposition." Letters by Historicus. p. vii.

18. In the biography of Henry Wheaton, 3 Lewis, Great American Lawyers, pp. 241, 282. The first book on the "law of nations" to be written and published in America seems to have been William John Duane's collection of essays entitled "The Law of Nations, Investigated in a Popular Manner, Addressed to the Farmers of the United States," published at Philadelphia in 1809. It had been preceded, however, by James Madison's "Examination of the British Doctrine which Subjects to Capture a Neutral Trade Not Open in Time of Peace," published anonymously in 1806.

19. In a review of Wheaton's "Elements," in the *North American Review* for January, 1837, p. 16, it was said to be the "first work upon the principles of the law of nations, that has appeared in the English language."

20. Possibly Dana's *Notes* to Wheaton may be partly attributed to his teaching at the Harvard Law School.

chief reliance for courses in international law. Lawrence B. Evans' Collection, first published in 1917 and revised in 1922, has been until recently the usual alternative to Scott's where the case system was in use, though a useful collection of *International Cases* was published in 1916 by Mr. Ellery Stowell and Mr. Henry F. Munro.[21] The editing of the case-books was facilitated and the study of international law was influenced during this period by Francis Wharton's *Digest* (1886), by John Bassett Moore's *History and Digest of International Arbitration* (1898) and his *Digest of International Law* (1906). The case-books greatly stimulated the study of international law, particularly in the law schools, and they improved the instruction both in the colleges and in the law schools. As the proper use of a case-book involves access to a larger library than was found in some of the colleges, it seems doubtful, however, whether the introduction of case-books greatly modified the instruction in some institutions. But some of the legal profession's prejudice was overcome during this period, and though much of the instruction continued in the hands of faculties of political science, the subject was rehabilitated in some degree as a part of professional legal training.

The Period Since the War

(5) A fifth period in the history of international law teaching in America may be said to begin with the rise of international organization, following the World War. This is the period in which our own efforts must figure, and if we cannot know where we are going we may at least know where we have arrived.

The events of the first quarter of the twentieth century have given a new significance to international law. Perhaps it may be said that no previous period in the world's history, not even that of Grotius, effected such revolutionary changes as those we are witnessing, in the relations of states and the law by which they are governed.[22] Transportation and communication have been improved to such an extent that peoples are bound together by many new ties and the international society is faced by many problems which did not exist a few decades ago. One of the results of the World War has been a greater willingness to seek solutions of these common problems by co-operative effort, and to that end enormous agencies have been created which have greatly changed some of our methods of handling international affairs. The process of international organization which began with the formation of the Universal Postal Union in 1874 and which was accelerated by the two Hague Conferences in 1899 and 1907, has come into fruition since the War in such a measure that we may now look upon our world society as an organized community. The frontiers of international law have been pushed out into new fields, and we find ourselves forced to meet a serious challenge to the philosophy underlying our tradition from the last century.

Now in such a period, what are the outstanding problems of teaching international law? They do not include the problem of gleaning from the continental writers as it faced our predecessors a century and a half ago; nor the problem of disstilling a law of nations from moral philosophy as it existed before Chancellor Kent wrote his *Commentaries;* nor the problem of systematization which confronted the treatise-writers of the last century; nor the problem of finding case-foundations as it was presented to Snow and Scott a generation ago. Ours is mainly the problem of understanding the effects of the transition in international law, and of laying foundations for its development along new lines. What was until recent times the vague aspiration of nations living in a state of anarchy, has become the cementing force which binds those nations together in an organized community. We may still cling to the theory of independent sovereign states,[23] but the relations of states are being modified on the bases of a recognition of their interdependence. To the body of doctrine which was developed in the course of the last century has now been added a great volume of international legislation,[24] and the teaching in this fifth period must not only take account of its content but must also supply a scientific basis for the continuance of the legislative process.

Abundant materials are now available for our exposition and exploration. None of our predecessors had such a wealth of sources for their investigations. Indeed, the variety of problems is now so great and the volume of documentation so large that it is more than one can do to keep abreast of the current of international affairs. Specialization has become a necessity. The complexity of modern world society makes it impossible for lawyers alone to develop the law of the future. It has become clear to us in this first quarter of the twentieth century that the science of law cannot push on without the aid of the other social sciences. International life must be studied in all its aspects, of which the legal aspect is only one; and we have reached a stage where an understanding of the changing law rests upon an understanding of all the phases of international life.

Now if this is a true picture of our situation, I suggest that we must foresee a greater division of labor than has been known in the past. There must be not only a professionalization of the study of international law, but also some professionalization of the study of other factors in international relations. The two functions are different, but they must be performed together. I suggest that the first of these devolves on the professional law schools, and the second devolves on other departments of our colleges and universities.

The Rôle of the Law Schools

For a professionalization of international law, we need to return to the days when the subject was a part of the equipment of the better-educated lawyers, and to this end a course on international law ought to find a place in the curriculum of every law school. The primary aim of the law schools is to prepare students for the practice of the law; but in many an American community questions of international law are continually arising in practice.[25] Case-books are needed which will take account of the practitioner's needs, and which will enable the subject to be taught by the same methods which are used in other law school courses. The conventional division between

21. A collection of cases by Norman Bentwich (1913) has been little used in America.

22. Cf., Duane, *Law of Nations* (1809), p. 10, where the author enumerates "the introduction of the mariner's compass, the discovery of a new route to India and of America, the invention of the art of printing, and the employment of gunpowder," as events which had revolutionized international law at an earlier period.

23. See the judgment in the Lotus Case, Publications of the Permanent Court of International Justice, No. 10, p. 18.

24. See the writer's list of multipartite treaties of legislative effect, concluded since 1918, published in the supplement to the *American Journal of International Law*, April, 1928, p. 90.

25. See Frederick C. Coudert, "International Law in Relation to Private Law Practice," 13 *Cornell Law Quarterly*, p. 13.

the law of peace and the law of war need not be continued in such case-books. In the course of our national history, only an infinitesimal part of the time of the legal profession has been devoted to the law of war, and it is not likely to be different in the future.[26] The case-books of the past have often failed, also, to present the actual contexts of the cases, without which their materials became merely a collection of readings. Mr. Edwin D. Dickinson is now in the course of publishing a case-book which is better adapted to law school instruction, and more collections of the kind are needed. With such aids available, the law schools cannot continue to neglect the subject as they have done for several decades past.

With more attention paid to courses on international law in the law schools, we may also foresee an improvement of their contribution to the literature of international law. The inquiry into the social utility of municipal law has made great progress in recent years, but a similar inquiry in international law is just beginning. The current treatises on international law continue the use of the question-begging terms which are being discarded by writers on private law; this may be illustrated by a reference to the use of the term "right" in several of the recent treatises. We have hardly begun to take advantage in international law of the recent advances in juristic science. We may need many more treatises, in the preparation of which Mr. Hyde has set a new standard; but perhaps the time has passed when any one scholar can hope to deal with the whole field of international law, and in the future we may have to depend more upon special studies than upon general treatises. Mr. Edwin M. Borchard's *Diplomatic Protection of Citizens Abroad* (1915) and Mr. Philip C. Jessup's *Law of Territorial Waters* (1927) are admirable examples of such studies. The publications of the Carnegie Endowment for International Peace, the richness of our current legal periodicals, and the inauguration of the codification of international law have paved the way for many such investigations to be undertaken.

The Rôle of the Colleges

This professionalization of international law should only proceed, however, in cooperation with the work which should be done on other aspects of international relations by the men who are teaching in the colleges. The college students who are preparing for life as citizens, as well as those who are intending to enter the law schools, need to know the world society in which their own country lives, and they should have an opportunity to study its characteristics while they are in college. Courses on international politics and organization should therefore be taught by faculties of political science, and courses on international trade by faculties of economics. Nor should other phases of international life be neglected in courses on sociology and psychology. Such emphasis may be impossible without some discussion of the principles of international law, but the needs of the college student would be better served by courses on international relations in general, than by courses on international law. The citizen needs to see international relations in other terms than legal, and the intending lawyer needs to study political and social factors of international life before he begins a study of international law.

This division of labor would call for the extension of international law in professional law schools, and the organization of college courses in different but related subjects. Few American colleges and universities have either the students or the equipment for courses in international law to be given by members of faculties of arts and science. The instructors in many colleges lack legal training, and they are more often better equipped to give courses in international relations instead. The college student has little to be gained from a smattering of international law; he does need an appreciation of the nature of his own community which is larger than any one nation. He should no more confine his study of international relations to international law, than he would confine his study of individual relations to the law of contracts and property and torts. The college will better serve its ends by emphasizing international organization, international trade, international communications, international finance—in short, international life.

The organization of college courses on international relations has been greatly facilitated by recent improvements in documentation. One of the great services rendered by the League of Nations has been in making available a mine of documents for the study of international affairs. The League of Nations Treaty Series, the thorough documentations of conferences held at Geneva, and the publications of the International Labor Office, have opened new doors to students' investigations. Our unofficial American literature of international affairs has become much more adequate in recent years. The publications of the Carnegie Endowment for International Peace, the Council on Foreign Relations, the Foreign Policy Association and the World Peace Foundation are available in most college libraries today. Moreover, a number of books recently published are available for college courses on international relations. First to be mentioned, perhaps, is the excellent and prophetic study of *Public International Unions* published by Paul S. Reinsch, in 1911. Leonard S. Woolf's volume on *International Government* (1916), Pitman B. Potter's *Introduction to the Study of International Organization* (1922), Philip Marshall Brown's *International Society* (1923), Jessie W. Hughan's *Study of International Government* (1923), Raymond L. Buell's *International Relations* (1925), Parker T. Moon's *Syllabus of International Relations* (1925), John Eugene Harley's *Selected Documents and Materials* (rev. ed. 1926), Part III of Charles E. Martin's and William H. George's *American Government and Citizenship* (1927), and Charles Hodges' *Background of International Relations* (1927), are admirably adapted for use in connection with such college courses. But many more books are needed.

The colleges' emphasis on international relations instead of international law ought also to have a good effect on our literature. An excellent example is Parker T. Moon's *Imperialism and World Politics* (1927). We have long been in need of studies of various international institutions. No adequate study of the Universal Postal Union has been published in English, though that league of nations has functioned successfully for more than half a century; nor have we had an adequate study of the International Union of Weights and Measures. How little has been published, also, on the work of the International Confer-

26. See the paper to be presented to the Conference by Dean Charles K. Burdick.

ences of American States! One must search our literature in vain for any useful *critique* of the Pan American Union. Now that we are so busily engaged in international legislation, the ground should be prepared by a study of each subject on which legislation is to be attempted. The problem of suppressing the slave trade, for example, has been one of the great problems of international life for a whole century; yet two years ago, when the slavery convention was being drawn up at Geneva, it was impossible to consult any work which summarized the accomplishments in that field. The international protection of industrial property, a subject of international legislation for almost half a century, has gone without any thorough investigation by scholars. These are but a few examples of the many subjects which await exploration. Their study is not primarily the task of the lawyers; they represent a field in which lawyers must await the judgment of men in other social sciences.

The Present Tendency

In suggesting that the teaching and study of international law should be professionalized, I hope I shall not be understood to mean that the legal profession can do its work in the field without the aid of the men in the colleges. What I suggest is that the legal profession should return to Chancellor Kent's emphasis on the law of nations as an essential part of legal education; that the subject be studied not as an appendage to political science, but as an integral part of juristic science; that, at the same time, the colleges should give us the assistance of their study of other phases of international relations.

I hope this program may be realized in some measure, in this fifth period of the history of international law teaching in America. And there are many indications that this may be so. The investigation which Mr. G. H. Robinson reported to us three years ago,[27] indicated that the law schools are coming to appreciate their opportunities in the field, and I think the recent contributions of professors in the law schools indicate their scholarly interest in the subject. On the other hand, the colleges seem to be tending toward an emphasis on international relations rather than international law. A professor of international relations has recently been appointed at Columbia University, and an Associate in international relations at Yale.

At the first Conference of teachers of international law and related subjects in 1914, a resolution was adopted calling for the establishment of courses on international law in all of our colleges. At our second Conference, in 1925, a distinction was made between courses on international law and courses on international relations, but the Conference did not foresee the professionalization of the former, and too little emphasis was put on the latter. At this third Conference, I think we should do well to emphasize further the "separation of courses in international relations from courses in international law," and to this end, I would propose that this Conference urge (1) the inclusion of international law in the curricula of all the law schools; (2) the inclusion of courses on international relations in the curricula of colleges of arts and science; and (3) the close cooperation between the teachers who are working in these two fields.

27. *Proceedings of the Second Conference of Teachers of International Law* (1925), pp. 18, 136.

A University Department of Air Law

THE fact that there is a special department of Air Law at the University of Koenigsburg, Koenigsburg, Germany, is brought out by the recent bestowal by that institution of the honorary degree of Doctor of Laws on Col. W. Jefferson Davis of San Diego, Cal., for his services in helping develop international air law. The honor was conferred by a representative of the faculty of the European University in person, Dr. Otto Schreiber, who was himself the founder of the Air Law Department referred to,—and it is understood that this is the first time the degree has been conferred for service and distinction in this particular branch. The ceremony took place at the University of Southern California and was attended by President Newlin of the American Bar Association and a number of other well known members of the profession. On this occasion Dr. Schreiber delivered an interesting address on "International Air Traffic Regulation." Among other things he said:

"Considered solely by itself, uniformity of law is not of any real interest. Nations are unwilling to give up, and rightly so, their own historical background merely for an indefinite uniformity. Jurisprudence must therefore define the limits of the desired uniformity. These limits are established by the interests of the future world-wide radio and air traffic. In radio, only wave lengths are capable of passage across national boundaries. The need of uniformity of law is satisfied when this free transit is granted, and when the due reproduction of radio messages is uniformly assured. Not so for air traffic. The companies engaged in air traffic are sending their machines and their employees across international boundaries. Their agencies must be spread all over the world, throughout the entire length of their airways. They have to contract for the carriage of persons and goods, with their employees in the different countries their lines touch. The management of an international air company is of itself an international enterprise. The prosperity of such management depends upon the utmost simplicity of its organization. Unbearable complications would ensue if each country presented widely differing legal problems. A pilot could not be expected to carry with him the air traffic rules, customs and police regulations of all the different countries he crosses in flight. No insurance could be contracted when risks widely differed during various stages of such flight. Bills of lading could not be handled if subject to varying conditions in various countries. In the field of aviation law the demand for uniformity of law is without doubt a larger one than in the case of radio. It includes a long list of rules founded in public and private law. The task of codifying public law is comparatively simple. Not so with private law. Air traffic management presents a new field. Governments may deal with it first hand. There are no precedents and no historic background from which to work. Uniformity of law may be predicated upon mutual agreement between governments.

"The International Air Navigation Convention of 1919 has taken advantage of this fortunate situation, and at the same time has made very remarkable progress in international organization. The International Commission for Air Navigation established by this treaty is entitled to issue rules of public air law which are effective in all countries members of the Convention and signatory thereto. The countries which have subscribed to this important treaty are willing for the first time to accept rules and regulations of public law issued by an authority—not their own, but an international one. Signatory to this Convention are not only European countries, but South American Republics, Australia, Canada and the Union of South Africa. So in this Convention we find the first beginnings of the United States of the World; an international authority with legislative powers transcending the historic boundaries of political states. At the same time we find here a very effective method of assuring the uniformity of public air law.

"In the field of private air law the same methods could not be applied. The rules of private air law are closely allied with the substantive law of each country. They cannot be unified by the majority vote of an international committee. International codes of private air law must be worked out very carefully by experts in order that they may be uniformly construed in the substantive law of each country.

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JOSEPH R. TAYLOR, MANAGER.
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CAMPAIGN STRATEGY AND THE RULE-MAKING POWER

In the forefront of the American Bar Association's program of congressional legislation is the bill giving to the Supreme Court of the United States, on the law side of its jurisdiction, the rule-making power which from the very beginning it has always had on the equity side.

In the forefront of programs for improvement in the administration of justice in each state is to be found the demand that the Courts exercise the rule-making power.

This proposal is not new. It dates officially back to the Report of the American Bar Association's Special Committee to Suggest Remedies and Formulate Proposed Laws to Prevent Delay and Unnecessary Cost in Litigation. That Report was made in 1909, and it at once attracted the attention of the Bar of the various states by reason of the clearness of its statement of the principles involved and the standing of the men who made it.

The Illinois Bar Association, and doubtless other Associations, promptly had the matter brought to its attention. In a Report of its Committee on Law Reform, in 1910, a careful consideration of the American Bar Association Committee's proposal regarding the rule-making power was recommended. That proposal was later approved. And in 1912 the same committee of the Illinois Bar Association raised the important question of the inherent power of the Courts themselves to prescribe the details of their own procedure, independently of legislative sanction.

"Have we not made a great mistake," it asked, "in appearing year after year before the legislature as humble suppliants for laws curing patent and confessed defects in our procedure when we might have secured a large measure of relief by an appeal to the courts for an amendment of their rules of practice?" Its justification of the query was this:

"It is the law of Illinois that no residuum of judicial power remains unvested nor delegated to any other department. The independence of the three departments of the Government is of course firmly established by our Constitution. The judicial department may not invade the province of the executive or legislative departments, nor may either of them invade the province of the judicial department.

"If, as so ably and forcibly stated by our Supreme Court, the rules for the admission of lawyers to practice, present a judicial question over which the legislature has no power, why is not a judicial question presented by rules regulating the manner and method of the transaction of legal business by these same lawyers before the judicial tribunals after they have been admitted to practice?"

The question may be asked as pertinently in probably all the other states of the Union as in Illinois. Constitutional provisions in all the states, with regard to the separation of the powers of Government into departments and the independence of these departments, are very similar. That an answer has not been demanded in Illinois, nor elsewhere, to the question raised, does not imply that the issue has been abandoned or that there is not a vast body of legal opinions which holds, almost as a self-evident proposition in view of our constitutional structures, that the regulation of procedure is inherently the business of the courts alone. It simply means that the campaign for the rule-making power has been conducted in accord with the strategy seemingly least calculated to arouse antagonism.

By 1924 this strategy was itself being subjected to criticism and the adoption of different methods based purely on the constitutional principles involved was being suggested. In the January, 1924, issue of the AMERICAN BAR ASSOCIATION JOURNAL, the suggestion of cutting the Gordian knot of

legislative indifference and delay was made editorially as follows:

"Is it not time for us to challenge the right of the legislative department to intermeddle in the administration of justice, by prescribing the methods adopted by the courts and lawyers in the performance of the duties of the judicial department? There are abundant signs that the bar is everywhere turning toward the exercise of the rule-making power as the most hopeful method of improving court procedure."

In the Supplement to the Journal on "The Rule-Making Power of the courts," issued by the Conference of the Bar Association Delegates in March, 1927, there is another interesting declaration on this subject. Judge Cutting quotes the provision for the independent rule-making power contained in the Constitution drafted in the Illinois Convention of 1922 and also the following statement from the "Address to the people" which accompanied submission of that instrument: "Indeed it is arguable that the making of laws by the General Assembly regulating the practice in courts is an invasion of the power of the courts and violative of the constitutional division of governmental powers into the three divisions of executive, legislative and judicial." And he adds:

"This Constitution was not adopted by the people, but it failed for reasons not connected with the judicial article. The Supreme Court of Illinois has been properly jealous of its prerogatives in most matters.

"In the case of In re Day, 181 Ill., 73, the court held unconstitutional, as interference by the legislature with a purely judicial matter, a statute relative to the admission of applicants to the Bar. . . . It would be but a single step further for our Supreme Court to treat statutes attempting to regulate practice, pleading and procedure in the same manner and promulgate its own rules therefor."

In Johnson v. Theodoron, 324 Ill., 543, the Supreme Court held that a statute which provided that if it was made to appear by affidavit that counsel for the party applying for it was a member of the General Assembly and was in actual attendance upon its sessions and that his presence in court was necessary to a fair and proper trial, the court should continue the suit, was unconstitutional because the determination of what orders should be entered in any suit is the exercise of judicial power and does not belong to the legislature. Is there not ground for hope that, by a parity of reasoning, it might be held in those states where the ancient right of the court to charge the jury according to the course of the common law has been attempted to be taken away, that such attempts are unconstitutional as interfering with the exercise of judicial power?

In continuation of this claim of the sufficiency of constitutional principle for the settlement of the question involved, we have an editorial by Dean John H. Wigmore in the November, 1928, issue of the Illinois Law Review under the title "All Legislative Rules for Judicial Procedure are void Constitutionally." Dean Wigmore begins it with the emphatic declaration that "it is high time to raise a constitutional question which has long remained in abeyance. We assert that the legislature (federal or state) exceeds its constitutional power when it attempts to impose upon the judiciary any rules for the dispatch of the judiciary's business; and that therefore all legislatively declared rules for procedure, civil and criminal, in the courts, are void, except as are expressly stated in the Constitution." He supports this proposition on the grounds of logic, as deduced from the Constitutional terms, and policy, as verified by experience.

What shall be done to carry on the campaign more successfully is still a question of the best strategy. But it would seem that the long years of hope deferred in the matter of congressional legislation conferring the rule-making power on the Supreme Court might well suggest the advisability of a resort to a different method. A case bringing the issue squarely before the United States Supreme Court would be inferior in real importance to no constitutional controversy of this generation. It would call forth all the scholarship and ability of the Bar. In case of failure, nothing would be lost. In case of success, everything would be gained which is contended for, and a great step to improve the administration of justice would have been taken.

JACOB M. DICKINSON

News of the death of Hon. Jacob M. Dickinson, thirtieth president of the American Bar Association, at Chicago on Dec. 13, was received too late for adequate notice in this issue. In the next number we trust to have a fitting memorial of his life and services.

REVIEW OF RECENT SUPREME COURT DECISIONS

New York Statute Requiring Filing of Certain Information From Oath-Bound Associations With More Than Twenty Members Held Not in Conflict With Fourteenth Amendment—Construction of Treaty Permitting Japanese Aliens to Lease Lands for Commercial Purposes—Zoning Ordinances and Due Process of Law—Pennsylvania Act Relating to Ownership of Drug Stores Held Unconstitutional—Louisiana Conservation Commissioner Held to Have Exceeded Powers—Federal Game Preserves and State Interference

By Edgar Bronson Tolman*

Equal Protection—Regulation of Oathbound Associations

The New York statute requiring the filing of information by oath-bound associations with more than twenty members is not in conflict with the Fourteenth Amendment, even though its requirements are more exacting than those imposed upon labor unions or orders mentioned in the benevolent orders law.

New York ex rel Bryant v. Zimmerman, Adv. Op. 52; Sup. Ct. Rep., Vol. 49, p. 61.

The relator here was arrested and held in custody for violating a statute of New York. He sought to be released on a writ of habeas corpus on the ground that the statute in question was unconstitutional. The state courts denied relief and the case was then presented to the Supreme Court on a writ of error. There the judgment was affirmed in an opinion delivered by Mr. Justice Van Devanter.

The statute under which the arrest was made provided that:

> "Sec. 53. Every existing membership corporation, and every existing unincorporated association having a membership of twenty or more persons, which corporation or association requires an oath as a prerequisite or condition of membership, other than a labor union or a benevolent order mentioned in the benevolent orders law, within thirty days after this article takes effect, and every corporation or association hereafter organized, within ten days after the adoption thereof, shall file with the secretary of state a sworn copy of its constitution, by-laws, rules, regulations and oath of membership, together with a roster of its membership and a list of its officers for the current year. . . ."
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> Sec. 56. . . . Any person who becomes a member of any such corporation or association, or remains a member thereof, or attends a meeting thereof, with knowledge that such corporation or association has failed to comply with any provision of this article, shall be guilty of a misdemeanor."

The relator's contention was that this statute was in conflict with several clauses of the Fourteenth Amendment. Before considering the merits of the case the grounds supporting the jurisdiction of the Court were considered, because not all of the Justices were in agreement on the question.

In disposing of this it was pointed out that while the practice in New York is somewhat unusual in form, nevertheless the point that the statute conflicted with the provisions of the Fourteenth Amendment had been presented in due time and with fair precision. Nor was it doubted by the majority that a judgment in a habeas corpus proceeding was a final judgment or decree within the meaning of Section 237a of the Judicial Code.

The merits of the case were then examined. The offense charged against the relator was that he attended meetings and remained a member of the Buffalo Provisional Klan of the Knights of the Ku Klux Klan in violation of the provisions above quoted. The privilege of so attending and remaining a member was thought to be not a privilege of federal citizenship, so that there was no basis for invoking the privileges and immunities clause. It was concluded likewise that the provisions of the statute relating to filing the required information were reasonable regulations not violative of the requirements of due process of law.

More extended discussion was devoted to the contention that the statute violated the equal protection clause. This contention was founded chiefly on the ground that its requirements were more exacting than those imposed on the associations and organizations specifically excepted in the statute quoted above. In the language of the opinion:

> The main contention made under the equal protection clause is that the statute discriminates against the Knights of the Ku Klux Klan and other associations in that it excepts from its requirements several associations having oath-bound membership, such as labor unions, the Masonic fraternity, the Independent Order of Odd Fellows, the Grand Army of the Republic and the Knights of Columbus—all named in another statute which provides for their incorporation and requires the names of their officers as elected from time to time to be reported to the secretary of state.

Various decisions were quoted showing that settled law sanctions reasonable classification. It was concluded that the principles embodied in these decisions had been applied properly in this case.

> The courts below recognized the principle shown in the cases just cited and reached the conclusion that the classification was justified by a difference between the two classes of associations shown by experience, and that the difference consisted (a) in a manifest tendency on the part of one class to make the secrecy surrounding its purposes and membership a cloak for acts and conduct inimical to personal rights and public welfare, and (b) in the absence of such a tendency on the part of the other class.

The opinion was concluded as follows:

> We assume that the legislature had before it such information as was readily available, including the published report of a hearing before a committee of the House of Representatives of the 57th Congress relating to the formation, purposes and activities of the Ku Klux Klan. If so it was advised—putting aside controverted evidence—that the order was a revival of the Ku Klux

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Klan of an earlier time with additional features borrowed from the Know Nothing and the A. P. A. orders of other periods; that its membership was limited to native born, gentile, protestant whites; that in part of its constitution and printed creed it proclaimed the widest freedom for all and full adherence to the Constitution of the United States, in another exacted of its members an oath to shield and preserve "white supremacy," and in still another declared any person actively opposing its principles to be "a dangerous ingredient in the body politic of our country and an enemy to the weal of our national commonwealth"; that it was conducting a crusade against Catholics, Jews and negroes and stimulating hurtful religious and race prejudices; that it was striving for political power and assuming a sort of guardianship over the administration of local, state and national affairs; and that at times it was taking into its own hands the punishment of what some of its members conceived to be crimes.

We think it plain that the action of the courts below in holding that there was real and substantial basis for the distinction made between the two sets of associations or orders was right and should not be disturbed.

Criticism is made of the classification on the further ground that the regulation is confined to associations having a membership of twenty or more persons. Classification based on numbers is not necessarily unreasonable. There are many instances in which it has been sustained. We think it not unreasonable in this instance. With good reason the legislature may have thought that an association of less than twenty persons would have only a negligible influence and be without the capacity for harm that would make regulation needful.

We conclude that all the objections urged against the statute are untenable as held by the courts below.

MR. JUSTICE MCREYNOLDS dissented on the ground that there was no substantial federal question disclosed by the record, and because the writ of habeas corpus was not a proper method of raising the invalidity of the statute. With reference to the latter question he said, in part:

The function of a writ of habeas corpus is to test the validity of challenged imprisonment—not the guilt or innocence of the prisoner. And over and over again this Court has asserted that it will not permit habeas corpus to perform the office of a writ of error. . . .

Undoubtedly, cases like this have been entertained here in the past. But, since it has become settled law that mere imprisonment and trial under a charge based upon an unconstitutional state statute does not deprive one of his liberty without due process of law, we should deny further jurisdiction. There is no longer any controverted federal question essential to decision of the cause.

This view is aided by consideration of the serious and manifest evil which will follow a different course. Certainly, we should not undertake to determine the validity of a state statute in advance of trial upon the merits simply because some prisoner sees fit to sue out a writ of habeas corpus upon the alleged ground of conflict between the statute and Federal Constitution.

The case was argued by Messrs. John H. Connaughton and W. F. Zumbrunn for plaintiff in error and by Messrs. Walter F. Hofheins, John H. Clogston and Albert Otttinger for defendants in error.

California Alien Land Law—Leasing for Commercial Purposes

Under the California statute which is in harmony with the treaty permitting Japanese aliens to possess land for commercial purposes, subjects of Japan are entitled to operate a hospital as a business undertaking and organize a corporation for the leasing of land for the erection of a hospital.

Jordan v. Tashiro, Adv. Op. 36; Sup. Ct. Rep., Vol. 49, p. 47.

This case involved an adjudication of the right of Japanese subjects resident in California to organize a corporation for leasing land in that state for a hospital. The respondents were subjects of Japan; they presented proposed articles of incorporation of the "Japanese Hospital of Los Angeles" to the Secretary of State of California for filing. The latter refused to file them, because in his opinion, they purported to authorize the corporation to lease land for a purpose not permitted by the Alien Land Law of the State.

The incorporators then brought a mandamus proceeding in a California court to compel the filing requested, alleging their right to use the land for the described purposes under an existing treaty between Japan and the United States. The treaty was proclaimed in 1911 and authorizes subjects of Japan to carry on trade within the United States and "to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established."

The laws of California permitted Japanese subjects of the class here involved to hold land in accordance with the existing treaty. In view of these elements the Supreme Court of California held that the mandamus should be granted because the organization of a corporation was a proper means of carrying on the proposed enterprise and a privilege secured by the Treaty.

On a writ of certiorari this judgment was affirmed in an opinion delivered by MR. JUSTICE STONE. He first stated the principles governing the construction of treaties in general terms as follows:

The principles which should control the diplomatic relations of nations, and the good faith of treaties as well, require that their obligations should be liberally construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them . . . . Upon like ground, where a treaty fairly admits of two constructions, one restricting the rights that may be claimed under it and the other enlarging them, the more liberal construction is to be preferred. . . .

While in a narrow and restricted sense the terms "commerce," or "commercial," and "trade" may be limited to the purchase and sale or exchange of goods and commodities, they may connote, as well, other occupations and other recognized forms of business enterprise which do not necessarily involve trading in merchandise. . . . And although commerce includes traffic in this narrower sense, for more than a century it has been judicially recognized that in a broad sense it embraces every phase of commercial and business activity and intercourse.

In the light of these principles the contention of the state officials that "trade" and "commerce" are confined to the purchase and sale of goods was rejected notwithstanding that such terms have been held to exclude agriculture.

Giving to the terms of the Treaty, as we are required by accepted principles, a liberal rather than a narrow interpretation, we think, as the state court held, that the terms "trade" and "commerce," when used in conjunction with each other and with the grant of authority to lease land for "commercial purposes" are to be given a broader significance than that pressed upon us, and are sufficient to include the operation of a hospital as a business undertaking; that this is a commercial purpose for which the Treaty authorizes Japanese subjects to lease lands.

After a brief discussion of the meaning of the phrase "commercial purposes" and of the propriety of a corporate form for conducting business the opinion was concluded as follows:

The principle of liberal construction of treaties would be nullified if a grant of enumerated privileges were held not to include the use of the usual methods and instrumentalities of their exercise. Especially would this be the case where the granted privileges relate to trade and commerce and the use of land for commercial purposes. It would be difficult to select any single agency of more universal use or more generally recognized as a usual

and appropriate means of carrying on commerce and trade than the business corporation. And it would, we think, be a narrow interpretation indeed which, in the absence of restrictive language, would lead to the conclusion that the Treaty had secured to citizens of Japan the privilege of engaging in a particular business, but had denied to them the privilege of conducting that business in corporate form. But here any possibility of doubt would seem to be removed by the clause which confers on citizens and subjects of the High Contracting Parties the right ". . . . to do anything generally incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established."

The case was argued by Mr. U. S. Webb, Attorney General of California, for plaintiffs in error and petitioners.

Zoning Ordinances—Due Process of Law

A provision in a zoning ordinance requiring the consent of two-thirds of the owners within four hundred feet of a proposed building will not be upheld as a valid exercise of the police power, where there is no showing that the proposed building and its use would be inconsistent with public health, safety, morals or general welfare.

State of Washington ex rel Seattle Title Trust Co. v. Roberge, Adv. Op. 39; Sup. Ct. Rep., Vol. 49, p. 50.

This case involved the validity of a certain provision of a zoning ordinance in force in Seattle. The case arose out of the refusal of the defendant, Superintendent of Building in that City, to issue a permit to a trustee which owned and maintained a philanthropic home for aged poor. The trustee proposed to remove an old building and to erect in its place a new one large enough to accommodate about 30 persons. The building would be mostly hidden from streets by trees and shrubs. The land involved was within the "First Residence District" as defined in the ordinance. By an amendment to the ordinance passed in 1925, a philanthropic home for children or old people is permitted when the written consent shall have been obtained of the owners of two-thirds of the property within 400 feet of the proposed building. But in the "First Residence District" there were allowed single family dwellings, public schools, certain private schools, churches, parks and playgrounds, an art gallery, private conservatories for plants, railroad and shelter stations; and upon certain conditions, garages, stables, offices for professional persons when located in the dwelling, sorority and boarding houses, a community clubhouse, nurseries, greenhouses, and buildings necessary in the operation of public utilities. Vacant property also could be put to certain uses.

The trustee failed to procure the required consents. Because of that failure the city superintendent, charged with the duty of issuing building permits, refused to issue a permit requested by the trustee for the erection of the philanthropic home. In a suit brought to compel the issuance of such permit the state courts upheld the ordinance and denied the relief to the trustee, thus holding that the ordinance did not impose an arbitrary restriction on the use of property, violative of the Fourteenth Amendment.

On a writ of error the Supreme Court reversed the judgment in an opinion delivered by MR. JUSTICE BUTLER. The opinion was devoted largely to a discussion of the non-applicability of the reasoning supporting zoning ordinances generally to a consent requirement of the type here involved.

> Zoning measures must find their justification in the police power exerted in the interest of the public. . . . "The governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited and, other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare." . . . Legislatures may not, under the guise of the police power, impose restrictions that are unnecessary and unreasonable upon the use of private property or the pursuit of useful activities. . . .
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> The right of the trustee to devote its land to any legitimate use is property within the protection of the Constitution. The facts disclosed by the record make it clear that the exclusion of the new home from the first district is not indispensable to the general zoning plan. And there is no legislative determination that the proposed building and use would be inconsistent with public health, safety, morals or general welfare. The enactment itself plainly implies the contrary. The grant of permission for such building and use, although purporting to be subject to such consents, shows that the legislative body found that the construction and maintenance of the new home was in harmony with the public interest and with the general scope and plan of the zoning ordinance. The section purports to give the owners of less than one-half the land within 400 hundred feet of the proposed building authority—uncontrolled by any standard or rule prescribed by legislative action—to prevent the trustee from using its land for the proposed home. The superintendent is bound by the decision or inaction of such owners. There is no provision for review under the ordinance; their failure to give consent is final. They are not bound by any official duty, but are free to withhold consent for selfish reasons or arbitrarily and may subject the trustee to their will or caprice. . . . The delegation of power so attempted is repugnant to the due process clause of the Fourteenth Amendment.

Cusack Co. v. City of Chicago was distinguished on the ground that the consent there required pertained to billboards which might endanger the decency and safety of the district, and thus constitute a nuisance. No such elements were found here.

The opinion was concluded as follows:

> As the attempted delegation of power cannot be sustained, and the restriction thereby sought to be put upon the permission is arbitrary and repugnant to the due process clause, it is the duty of the superintendent to issue, and the trustee is entitled to have, the permit applied for.
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> We need not decide whether, consistently with the Fourteenth Amendment, it is within the power of the State or municipality by a general zoning law to exclude the proposed new home from a district defined as is the first district in the ordinance under consideration.

The case was argued by Mr. Corwin S. Shank for plaintiff in error and by Mr. A. C. Van Soelen for defendant in error.

Due Process of Law—Police Power—Ownership of Drug Stores

The Pennsylvania Act requiring that all members of a corporation owning a drug store shall be registered pharmacists is invalid as an arbitrary restriction on the use of property.

Liggett Co. v. Baldridge, Adv. Op. 45; Sup. Ct. Rep., Vol. 49, p. 57.

The constitutionality of an act of the Pennsylvania legislature relating to the ownership of drug stores was presented for adjudication in this case. The act required that every drug store shall be owned by a registered pharmacist, or if owned by a partnership or corporation every partner or member shall be a registered pharmacist. Exceptions were made as to drug stores already owned by corporations, etc., as well as certain other exceptions not here important.

Here the appellant, Liggett Company, a Massachusetts Corporation, acquired two additional drug stores in Pennsylvania to add to its chain of stores. Not all

of its members or stockholders were registered pharmacists, and consequently the Board of Pharmacy refused to grant a permit to it to carry on business. Public authorities threatened prosecution under the act which provided severe and cumulative penalties for its violation. The corporation sued to enjoin such threatened acts on the ground that the statute contravened the equal protection and due process clauses of the Fourteenth Amendment.

The statutory court of three judges which heard the case in the first instance upheld the contentions of the state officials that the act was constitutional because there was a substantial relation to public interest in the ownership of a drug store where prescriptions were compounded. This conclusion was reached upon the theory that corporate owners purchasing medicines for dispensing might have greater regard for price than for quality, and that if the legislature had reached such a conclusion the court would not undertake to say that it was so unreasonable as to render the statute unconstitutional.

On appeal, the Supreme Court reversed this in an opinion delivered by MR. JUSTICE SUTHERLAND. He first pointed out that the corporation's interest was within the protection of the clauses of the constitution invoked by it, saying:

> That appellant's business is a property right, . . . and as such entitled to protection against state legislation in contravention of the federal Constitution, is, of course, clear. That a corporation is a "person" within the meaning of the due process and equal protection clauses of the Fourteenth Amendment, and that a foreign corporation permitted to do business in a state may not be subjected to state statutes in conflict with the federal Constitution, is equally well settled. . . . And, unless justified as a valid exercise of the police power, the act assailed must be declared unconstitutional because the enforcement thereof will deprive appellant of its property without due process of law.

The specific question here important, as stated in the opinion, was "What is the effect of mere ownership of a drug store in respect of the public health?" In answering this a brief review was presented of numerous provisions of law in force in Pennsylvania to prevent the sale of impure drugs or the supervision of a drug store by anyone except a registered pharmacist. In view of these various provisions it was thought that "every point at which the public health is likely to be injuriously affected by the act of the owner in buying, compounding, or selling drugs and medicine, is amply safeguarded."

> The act under review does not deal with any of the things covered by the prior statutes above enumerated. It deals in terms only with *ownership*. It plainly forbids the exercise of an ordinary property right and, on its face, denies what the Constitution guarantees. A state cannot, "under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them." . . .
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> In the light of the various requirements of the Pennsylvania statutes, it is made clear, if it were otherwise doubtful, that mere stock ownership in a corporation, owning and operating a drug store, can have no real or substantial relation to the public health; and that the act in question creates an unreasonable and unnecessary restriction upon private business.

Since the record contained no showing of evidence before the legislature or the court of a substantial relation of ownership to public health it was concluded that,

> The claim, that mere ownership of a drug store by one not a pharmacist bears a reasonable relation to the public health, finally rests upon conjecture, unsupported by anything of substance. This is not enough; and it becomes our duty to declare the act assailed to be unconstitutional as in contravention of the due process clause of the Fourteenth Amendment.

MR. JUSTICE HOLMES delivered a dissenting opinion in which MR. JUSTICE BRANDEIS joined. The significant portion of that opinion follows:

> A standing criticism of the use of corporations in business is that it causes such business to be owned by people who do not know anything about it. Argument has not been supposed to be necessary in order to show that the divorce between the power of control and knowledge is an evil. The selling of drugs and poisons calls for knowledge in a high degree, and Pennsylvania after enacting a series of other safeguards has provided that in that matter the divorce shall not be allowed. Of course, notwithstanding the requirement that in corporations hereafter formed all the stockholders shall be licensed pharmacists, it still would be possible for a stockholder to content himself with drawing dividends and to take no hand in the company's affairs. But obviously he would be more likely to observe the business with an intelligent eye than a casual investor who looked only to the standing of the stock in the market. The Constitution does not make it a condition of preventive legislation that it should work a perfect cure. It is enough if the questioned act has a manifest tendency to cure or at least to make the evil less. It has been recognized by the professions, by statutes and by decisions that a corporation offering professional services is not placed beyond legislative control by the fact that all the services in question are rendered by qualified members of the profession.

The case was argued by Messrs. Owen J. Roberts and Roy M. Sterne for appellant and by Mr. Paul C. Wagner for appellees.

Conservation Statutes—Construction of Power Delegated

No statutory provision in Louisiana justifies the Commissioner of Conservation of that state in refusing unqualifiedly to issue a permit for the erection on private property of a factory for the manufacture of carbon black from natural gas.

Herkness v. Irion, Adv. Op. 48; Sup. Ct. Rep., Vol. 49, p. 40.

This case was presented to the Supreme Court on appeal from a dismissal of the plaintiff's bill by a district court of three judges sitting in Louisiana. The plaintiff sought to enjoin certain officials of that state from interfering with the erection on his land, without a permit, of a factory for manufacturing carbon black from natural gas. The significant element in the plaintiff's contention was that the Commissioner of Conservation had adopted a fixed rule of administration of denying the permits in question for new carbon black plants in order to reduce gradually the use of gas for this purpose; and that such a rule was void because in excess of the powers which were conferred on him by statute or could be conferred under the state constitution and violative of the equal protection and due process clauses of the Fourteenth Amendment.

The district court denied the relief sought, but on appeal this was reversed by the Supreme Court in an opinion delivered by MR. JUSTICE BRANDEIS who expressed the view that there was no justification in the statute for the Commissioner's position, and that consequently the plaintiff was entitled to relief irrespective of the constitutional questions.

> The conservation of natural resources has been the subject of much legislation in Louisiana. The possible wastefulness of the use of natural gas in the manufacture of carbon black was recognized; and the Legislature dealt fully with this use. . . . No law declares such use necessarily wasteful. Nor has the State purported to confer upon the Commissioner power to refuse a permit

to new concerns and to restrict the use to the persons already engaged in the manufacture of carbon black. On the contrary, the use is expressly sanctioned in §1 of Act 91 of 1922, which declares, "that natural gas may be used in the manufacture of carbon black under the conditions as fixed and imposed by the provisions of" that act. And it is to those conditions and the means of ensuring their their observance that the other provisions of the Act relate. Section 2 thereof directs the Commissioner to determine "what percentage of consumption of natural gas produced by each gas well may be used in the manufacture of carbon black. . . . which percentage shall not be less than fifteen percent and not more than twenty percent of the potential capacity of such well. . . ." By §3 he is authorized to reduce the consumption of natural gas used in the manufacture of carbon black below that minimum "after promulgation for sixty days of an order to that effect, whenever (and only whenever) it is actually necessary to do so in obtaining an adequate supply of natural gas for domestic heating and lighting purposes in the State of Louisiana, and for manufacturing plants, industries and enterprises located and operated within the State of Louisiana, other than those engaged in the manufacture of carbon black. . . ." Other sections of the 1922 Act define the conditions under which natural gas can be burned into carbon black. There is not even a contention that a condition existed which would have authorized the issue of an order reducing the minimum percentage of use, pursuant to §3 of Act 91 of 1922.

Many detailed provisions concerning permits for the building of plants to burn natural gas into carbon black were added by Act 252 of 1924. But the additional provisions, and the specific powers there conferred upon the Commissioner, deal only with regulation of the use. The legislation contemplates, not restriction of the use to existing plants, but the further issue of permits to all who will "completely abide by and comply with all the provisions of this Act, and with all the rules and regulations of the Commissioner of Conservation established under the provisions of the Act." §5. And it expressly provides that "The authority given the Commissioner of Conservation by this Act shall in no sense be understood to supersede or nullify any of the provisions of this Act, or any other act of this State, but shall be cumulative and in aid thereof." §11.

As it is clear that the refusal of the Commissioner was not justified by any statutory provision, we have no occasion to consider the limitations imposed by the constitution of the State upon discriminatory action and upon delegation of legislative power to an executive department.

The case was argued by Mr. John W. Davis for appellant and by Mr. Percy Saint for appellees.

Federal Game Preserves—Interference by State Officials

Federal officers killing game on United States preserves, to save the game from starvation, under the authority of Congress, are not subject to the control of state officials enforcing state game laws.

Hunt et al. v. United States, Adv. Op. 42; Sup. Ct. Rep., Vol. 49, p. 38.

The opinion in this case delivered by MR. JUSTICE SUTHERLAND, dealing with the authority of state officials acting under state game laws to interfere with the killing of game on federal preserves, is brief enough to be set forth in full.

> The Kaibab National Forest and the Grand Canyon National Game Preserve, covering practically the same area, are situated north of the Colorado River in Arizona. They were created by proclamations of the President under authority of Congress. During the last few years deer on these reserves have increased in such large numbers that the forage is insufficient for their subsistence. The result has been that these deer have greatly injured the lands in the reserves by over-browsing upon and killing valuable young trees, shrubs, bushes and forage plants. Thousands of deer have died because of insufficient forage. Attempts were made under the direction of the Secretary of Agriculture to remove some of the deer from the reserves to other lands, but these entirely failed as did other means. The district forester, acting under the direction of the Secretary of Agriculture, proceeded to kill large numbers of the deer and ship the carcasses outside the limits of the reserves. That this was necessary to protect the lands of the United States within the reserves from serious injury is made clear by the evidence. The direction given by the Secretary of Agriculture was within the authority conferred upon him by act of Congress. And the power of the United States to thus protect its lands and property does not admit of doubt, . . . the game laws or any other statute of the state to the contrary notwithstanding.
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> Appellants interfered with these acts of the United States officials and threatened to arrest and prosecute any person or persons attempting to kill or possess or transport such deer, under the claim that such officials were proceeding in violation of the game laws of the state of Arizona, the observance of which would have so restricted the number of deer to be killed as to render futile the attempt to protect the reserves. Three persons who had killed deer under authority of United States officials were actually arrested. Thereupon suit was brought to enjoin appellants from continuing or threatening such interferance, arrest or prosecution. The court below, after a trial, found for the United States and entered a decree in accordance with the prayer of the bill, with the limitation, however, that the decree should not be construed to permit the licensing of hunters to kill deer within said reserves in violation of the state game laws. . . .
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> While the Solicitor General does not concede the authority of the court to make this limitation, he is content to let the decree stand. We, therefore, pass the matter without consideration and accept the opinion and decree below, with the modification that all carcasses of deer and parts thereof shipped outside the boundaries of the reserves shall be plainly marked by tags or otherwise, in such manner as the Secretary of Agriculture may by regulations prescribe, to show that the deer were killed under his authority within the limits of the reserves.

The case was argued by Mr. Earl Anderson for appellants and by Solicitor General Mitchell for appellee.

Insurance Companies—Regulation of Rates

A state statute authorizing the superintendent of insurance to order a general reduction of insurance rates where it is shown that the aggregate profit of all insurance companies in the state is excessive will not be held unconstituional as applied in an order of the superintendent on the ground that he adopted erroneous methods and bases of calculations in making the order, in the absence of a showing that the complaining company was injured or that all companies in the state are so well and economically managed that all will be injured by such order.

Aetna Insurance Company et al v. Hyde, Adv. Op. 163; Sup. Ct. Rep., Vol. 48, p. 174.

In this case the petitioners, 156 insurance companies, were allowed a writ of certiorari to review the decision of the Supreme Court of Missouri holding that section 6283 of the Revised Statute of Missouri was constitutional as construed and applied by the superintendent of insurance of that state. Acting under that section of the statute the superintendent had ordered a reduction of 10 per cent. of insurance rates charged by stock companies for fire, hail and windstorm insurance. The companies, parties to this unit, sued under section 6284 to set aside the order, challenged the methods employed to make the calculations and alleged the findings to be unreasonable, confiscatory and in violation of due process of law.

The Circuit Court set aside the order, but its decision was reversed by the Supreme Court of Missouri. On certiorari this latter decision was affirmed, MR. JUSTICE BUTLER delivering the opinion of the Court.

Section 6283 of the statute under which the proceeding originated, empowered the superintendent of

insurance to investigate the necessity for a reduction of rates and if "the result of the hearings in this State of stock fire insurance companies for five years next preceding such investigation shows there has been an aggregate profit therein in excess of what is reasonable, he shall order such reduction of rates as shall be necessary to limit the aggregate collections by insurance companies in this state to not more than a reasonable profit." Provision was made for full judicial review of the findings and the order and power was conferred on the state courts to sustain, modify, or set aside orders of the superintendent.

The complaint alleged: that the rates before the reduction order were not excessive; that each company has plants in Missouri ranging from $10,000 to $50,000 in value besides valuable good will; that expenses are normally 35 per cent. to 45 per cent. of earned premiums and the yearly aggregate of all expenses is approximately 42 per cent. of all earned premiums, but that the total expenses for the five year period ending with 1921 were 44 per cent. of all premiums earned for insurance written in that period; that each company maintains a sum equal to unearned premiums as required by law; that each should have a surplus of capital stock of 3 per cent. of premiums on fire insurance policies to cover hazards of conflagration and 10 per cent. of other premiums against risk of other catastrophes; that each company is entitled to an underwriting profit of at least 5 per cent. of earned premiums; that such profit is arrived at by subtracting losses and expenses incurred from premiums earned; that in the five year period ending 1921 losses were 64.9 per cent. of earned premiums, expenses 44.4 per cent, making 109.3 per cent. in all not allowing for funds to meet conflagrations, catastrophes, or for profits.

It further alleged that a previous order had been made January 5, 1922, reducing rates 15 per cent. The companies sued to enjoin the enforcement of that order and the case was dismissed on stipulation that the superintendent would call a hearing after March 15, 1922, to investigate the necessity of reducing rates and that at such hearing the companies' experience should be offered in evidence, that other evidence would be presented and that the superintendent would make certain findings of fact. In connection with this the following appeared in the stipulation:

> "That if . . . an order reducing the rates . . . be made . . . the said insurance companies, if dissatisfied . . . will proceed to secure a review thereof by the trial de novo in the Circuit court of Cole County, Missouri. . . . That in such matter the question of the constitutionality of Secs. 6283 and 6284 . . . shall not be raised, nor shall the legality of the hearing above provided for be questioned."

It was alleged that the findings were not made as agreed, but the order states that the companies refused to submit data on which such findings could be made, and that consequently the findings made were based on sworn reports filed during the five year period:

> The findings contained in the order are that, in respect of the business in Missouri, the companies in that period collected net premiums amounting to $81,087,318, interest on capital and surplus prorated to that state $2,801,660 and interest on unearned premium reserves $2,418,596 making a total of $86,287,574; that they paid losses of $45,066,124; that expenses amounted to $32,534,617 leaving $8,686,833 profits, and that expenses were excessive by not less than $5,000,000. The order declared that the rates then in force produced excessive and unreasonable profits and that a reduction of 10 per cent in the existing rates would result in profits that are reasonable. And it directed that rates so reduced take effect November 15, 1922.

The contentions of the companies were summarized as follows in the opinion:

> The complaint avers that if section 6283 be construed to authorize the superintendent of insurance to take into account interest on earnings, capital stock, surplus and unearned premium reserves or to make his determination of profit or loss on the basis of premiums received and losses and expenses paid—as distinguished from premiums earned and losses and expenses incurred,—or if it be held to authorize the superintendent to regulate the expenses of the companies or the inspection of their risks or the amount of insurance they may write, then the section would violate the due process clause of the Fourteenth Amendment. And it charges that the methods and calculations employed and the findings of fact made by the superintendent are erroneous, unreasonable and unjust; that the prescribed rates are unreasonable, inadequate and confiscatory, and that the enforcement of the order would operate to deprive the petitioners and each of them of their property without due process of law.

The superintendent denied the allegation of fact made and contended that the order and findings were not violative of due process of law.

The Supreme Court of Missouri found the reduction order supported by the evidence, but did not enter into the question of federal constitutional law. This latter question was the one pressed on the writ of certiorari and in the opinion it was pointed out that the companies would not challenge the constitutionality of the statute if construed as they contend it should be, to require the superintendent to make his determination not as alleged in the complaint but on the basis of premiums earned and losses and expenses incurred.

In disposing of the contentions of the companies MR. JUSTICE BUTLER emphasized the fact that no showing was made that any particular company would be injured by the order, and in the absence of a showing that each company is so efficiently and economically managed that the order therefore injures every company, no ground was disclosed for interfering with the order:

> The reduced rates are applicable to the business of all companies alike and without regard to the amount of the past or prospective profits or losses of any of them. And the attack is by joint action of all the companies. It is not claimed by or on behalf of any company that, when applied to its business, the reduced rates are or would be too low to permit the company to make a reasonable profit or to have just compensation for its contract of insurance.
>
> No company receiving just compensation is entitled to have higher rates merely because of the plight of its less fortunate competitors. Companies whose constitutional rights are not infringed may not better their position by urging the cause of others. Supervisors v. Stanley, 105 U. S. 305, 311; Heald v. District of Columbia, 259 U. S. 114, 123.
>
> As a practical matter of business, it is impossible in the long run for some companies to collect higher premiums than those charged by others in the same territory. Rates sufficient to yield adequate returns to some may be confiscatory when applied to the business of others. But the latter have no constitutional right to prevent their enforcement against the former.
>
> The Fourteenth Amendment does not protect against competition. Moreover, "aggregate collections" sufficient to yield a reasonable profit for all do not necessarily give to each just compensation for the contracts of insurance written by it. It has never been and cannot reasonably be held that State-made rates violate the Fourteenth Amendment merely because the aggregate collections are not sufficient to yield a reasonable profit or just compensation to all companies that happen to be engaged in the affected business. . . .
>
> The complaint was framed to secure judicial review (section 6284) of the determination of the respondent. The ground of attack was that the aggregate profits under the

(*Continued on page 43*)

ORATORY A CLASSIC TRADITION

Decline of Art of Eloquence in Pulpit, at the Bar and in Public Life—Due to Underrating Intelligence of People and Lack of Urge to Challenge Their Highest Thought—Present-Day Unwillingness to Pursue Studies Which Lead to Proficiency in This Useful Art—Its Place in Modern Life*

By H. M. Garwood
Member of the Houston, Texas, Bar

WHILE there is a written oratory, the term as here used applies to the spoken word. True it is that literature is often oratory. The speeches of the Grecian chieftains in "The Iliad," the debates of the princes of Hell in "Paradise Lost," the appeals of the conspirators and Antony's great reply in "Julius Caesar," are oratory of the highest type. Macaulay, whether as essayist or statesman; Lamartine, whether as poet or historian, is always an orator. While certain great rules apply as well to literature as to oratory, their processes and their ends are different.

Charles James Fox, declared by Burke the greatest debater in the language, said that a good speech never reads well. This was too often true of Fox. The orator seeks immediate results, and is not always concerned with classic form. This, however, is the exception. A good speech should and generally does read well.

Our subject may be further limited: it will not include those great emotional prodigies such as Chatham, Patrick Henry or Mirabeau, but rather those whom DeQuincey would term the rhetorician —those for whom Cicero wrote "De Oratore" and Quintilian "The Education of an Orator," those who study Aristotle's "Rhetoric," Plato's "Phaedrus," in a word, those who in terms of conscious art drive to specific ends and with classic diction appeal to the aesthetic sense while they instruct, uplift, persuade—men whose deliverances are hung in the gallery of the mind as we place the pictures of the great artists. Of these, Cicero, Bolingbroke, the younger Pitt, Rufus Choate, Webster are classic examples.

Socrates naturally contended that the spoken word for instruction was superior to the written page; Aristotle contended that the controlling purpose of the orator should be to instruct; Cicero and Quintilian, skilled lawyers and public men, that it was to persuade; all of these great teachers conceived it to be an intensely practical and useful art.

The Greek schools of rhetoric produced excellent results, but they were weakened by the Sophists, diluted by Asiatic ornament, and even in the time of Socrates were tending to formalism and intense artificiality.

The Roman rhetoricians, with the advantage of Greek instruction, greatly improved the art. The Roman mind was more practical and orderly than the Greek. While perhaps the language was less flexible, it was more logical. The Greek appeal was more to the emotions, the Roman to the intellect. The science of the law, with its logical processes and sobering effect upon mind and language alike, had developed. It would seem that Quintilian is right in ascribing superiority to the Roman rhetoric and, in that regard, while acknowledging the greatness of Demosthenes, he places Cicero above him. Pericles is a tradition; Thucydides assumes to reproduce him, but the great Roman critic doubts the authenticity of these fragments.

Oratory or rhetoric, in the sense here used, is the product of high culture, of intense, special, continuous study and preparation. Cicero, in his "Remarks on Ancient Orators," says:

> "Eloquence is the attendant of peace, the companion of ease and prosperity, and the tender offspring of a free and well-established constitution."

It has exerted a great influence in human affairs, but it no longer exists; it is a tradition; it is no longer taught, studied or practiced. The very term "rhetoric" has become a reproach. To say that a speaker is rhetorical is to finally condemn. There are doubtless schools of public speaking, but they have no background of history, philosophy or logic; literature is foreign to their methods or aims. They are mere schools of empty declamation, frequented by ambitious salesmen and would-be after-dinner speakers. Oratory is not taught in the old manner, and one admitting that he was seriously studying to become an orator would be exposed to instant ridicule.

The questions I would submit for your consideration are these: If this be true, what are the underlying causes? Is it an intellectual loss to the community? Has oratory a place in modern life? Should it be pursued as a high art, if not in the same manner at least with the same high purposes of the ancients?

Hitherto there have been three special fields of oratory—the pulpit, the bar, public life. A fourth is emerging which, haply, may bring back the glory of the great tradition—the lecture.

The Pulpit

There have been great pulpit orators, though one wonders that there have been so few—Abelard, Savonarola, Bossuet, Jeremy Taylor, Jonathan Edwards, Henry Ward Beecher. Cicero thought that the study of philosophy was the great essential to the equipment of the orator. Surely the problems of the human soul, of the ultimate good, of life and death, should be fit subjects for the orator. The "sweet eloquence" of Plato is remarked by all teachers. Cicero, in his "De Officiis," says that had Plato and Aristotle attempted forensic

*Address at Annual Dinner of the Jefferson County Bar Association, at Beaumont, Texas, on March 12, 1927.

eloquence they would have spoken with equal fluency and power. Socrates speaks of rhetoric as a means, by the power of words, to save men's souls. From all over Europe the eloquence of Abelard brought scholars to Paris. When Jonathan Edwards told of the wrath of an avenging God the unemotional Puritans writhed and fainted in horror. Today, eloquence in the pulpit is as rare as at the bar. The pulpit does not compete with the golf course. One hears from the pulpit less of philosophy and religion than of prohibition and politics.

The Bar

The oratory of the bar is its great tradition, but it is only a tradition. It played no great part in the Athenian development of the art, but at Rome it reached a very great height. Few lawyers even now are aware of the intense legal life of Rome. Quintilian, himself an accomplished advocate, who writes in modern phrases of that life, says that Cicero reigned supreme in the courts, a statement one would take at its face value save for Cicero's own description of the ability of Hortensius and other advocates of his day. In England, the Inns of court were centers not only of legal study, but of general culture. Chaucer refers to their "curious learning." Ben Johnson calls them "nurseries of freedom." Men who did not intend to practice law took their terms that they might, at the very fountain of liberty, learn the great principles of English law and English freedom. Burke, the younger Pitt, and Macaulay are examples. Ben Johnson refers to the "neat" oratory of Bacon, saying that always the great fear of his hearer was that he should make an end. Perhaps the greatest advocate in our language was Thomas Erskine, who, steeped in Shakespeare and Milton, was deeply learned in all the fundamental principles of the English constitution. His argument on the law of constructive treason, in the trial of Lord George Gordon, is perhaps the longest, loftiest, and best sustained flight of pure ratiocination in the language. That in the Dean of St. Asaph's case, in which he described the impeachment proceedings of Warren Hastings, is superior to Macaulay's historic picture, and was undoubtedly its inspiration. While he is, of course, the great classic figure, his contemporaries and successors were not unworthy to be classed with the great exemplars of all oratory —the Greek and Latin orators.

Their American successors have not been in any way inferior. While, naturally, the period of Revolution was not rich in legal oratory, the epoch succeeding the adoption of the constitution furnishes a galaxy of cultured lawyers which will bear comparison with any country in any age. We naturally think of Webster rather with reference to public life than to the narrower and more intense exertions of the bar. He is one of the very few who have been great in both fields. Many of his speeches make classic literature. As an advocate, however, great as he was, he was hardly the equal of Rufus Choate, whose exquisite literary sense and Oriental imagination, united to a logical subtlety of argumentation and a fundamental knowledge of the black letter learning of the law, made him the equal if not the superior of Erskine. To these may be added Pinckney and Wirt, Thomas Addis Emmett, S. S. Prentiss and an hundred others. The great spectacles presented in the arguments in the Dartmouth College case, Gibbons v. Ogden, McCullough v. Maryland, are the most precious traditions of the American bar. The halls of Congress were deserted, official and social Washington crowded the old court to witness the most splendid displays of eloquence that have ever illumined any age or time. Now, the most uninteresting place in Washington is the chambers of the Supreme Court of the United States.

This is equally true in our own courts. Who now remembers Ex Parte Rodriguez, when Jack Hamilton, A. W. Terrell and George Flournoy, the fate of a nation trembling in the balance, contended like Titans in the old stone capitol at Austin? The eloquence of these and their great compeers, William M. Walton, Thomas M. Sneed, G. W. Jones, Seth Shepherd, are but dim traditions lingering in the memory only of the older members of the bar. How many living men in our profession keep up the tradition of Jones Rivers, of R. M. Williamson, and the great spirits I have mentioned? . . . .

These men and their great contemporaries were orators not by accident or by inspiration, but because of deep study and the careful, conscious application of the principles of the greatest of arts, that of persuasion, to their tasks.

We have great lawyers, without doubt, and I believe that the Texas bar will compare favorably with that of any state, or any nation. But the crowning glory of the profession—it eloquence—has faded. Among the very few now living whose efforts at the bar recall the great memories of that elder day, you will all, I feel sure, concur with me when I mention the name of Judge Nelson Phillips, recently Chief Justice of our Supreme Court, who, like Marshall, is at once the great advocate and the great judge.

The oratory of the bar is its greatest tradition, but it is only a tradition. Whatever may be the causes, the complexity of modern life, the press of business, the overwhelming number of precedents to be consulted, the physical limitation of time upon argument—eloquence, as we once knew it, has disappeared. The lawyer, once inevitably a public character and one whose profession demanded, if he obtained high place, the qualities of the skilled rhetorician, has become a cog in the business machinery of the community. We, as lawyers, study the presentation of great causes at the bar as the scientist studies the prehistoric man. The question presents itself—will this great tradition ever return to ennoble and glorify the practice of the law as the greatest of all intellectual professions?

Public Life

All that has been said relative to the decline of this high art of eloquence in the pulpit and at the bar applies with even greater force to our public life. We have reached, there at least, a dead level of mediocrity. What gentlemen present can recall within recent years any great public deliverance of an American statesman that has thrilled, or uplifted the common mind? Who reads the Congressional Record? Of all strange departures from a national art, this is the strangest. The English and American mind and language are peculiarly oratorical. Taine, the great French critic, says that England's highest literature is oratory. He con-

stantly refers to Dryden, Milton, Samuel Johnson, Junius, Macaulay, as great orators. This high expression of the Anglo-Saxon genius passed into and became a part of the public life of England and of America. What a royal succession of sceptered intellects, governing, controlling, uplifting the public mind, is that beginning with Bolingbroke, and coming down through Chatham, Burke, the younger Pitt, Charles James Fox, Alexander Hamilton, Henry, Webster, to Lincoln, Douglas, Yancey, and Ben Hill! This, too, has become a mere tradition. Charles A. Culberson and Joseph W. Bailey are the last of that great race.

It is often said that the day of the orator has passed; that the general rise of intelligence, the prevalence of the daily newspaper, render the people less disposed to be moved by eloquence, by the power of the spoken word. This is basicly fallacious. It renders the work of the real orator less burdensome; there is not so much to explain; the audience already knows. The orator has liberty to devote himself to the highest excellences of his art. That art has always flourished at the times of greatest general intellectual achievement.

It will not do to say that great occasions no longer arise to demand these supreme exertions of the intellect. What greater occasion can the imagination conjure up than the debate in the United States Senate on the League of Nations? The greatest war in all history had ended; the world was in ruins; the universal desire for peace had called up again the dream of Henry of Navarre, of Grotius, and of all the greatest publicists of Europe for a permanent congress of the nations, which, harmonizing moral and international law, would, if it did not insure permanent peace, at least reduce the chance of war to a minimum. It may have been a beautiful dream, but if a dream, it had been a vision of many of earth's proudest intellects. Whatever may be your opinion, or mine, as to its practical working out, all must agree that it was as great a subject as was ever submitted for practical solution to a legislative assembly. Compared with this great subject, Cicero before the Roman Senate pleading against Verres the cause of plundered Sicily, or Burke before the House of Commons in the impeachment of Hastings, urging the injuries of plundered India, were trival incidents. Yet who here present can now recall one single notable deliverance or utterance from any member of the United States Senate on that supremely great occasion? It would be interesting, did time permit, to compare that debate with the discussion in the House of Commons upon the occasion of proposed peace with the French Republic, in which the great protagonists were Pitt, the younger, and Charles James Fox, where the whole history and diplomacy of the world, the rights of nations, the great underlying principles of international law and political economy were handled with easy mastery and classic phrase by these giants of debate and oratory. The debates upon a subject almost as great, that of the world court, is a similar example. These questions of world-wide significance were determined either upon considerations of narrow, partisan politics, or as a court would dispose of special exceptions to a petition.

It cannot be said, therefore, that there are no longer great occasions for the skillful and eloquent presentation, by skilled and trained intellects, of great public questions. It cannot be said that the state of the public mind is such that the efforts of the trained orator, or rather rhetorician, as that term is here used, will not be received with favor. Oratory has declined because we underrate the intelligence of the people, and have not the urge to challenge their highest thought. This highest and most useful of all high arts has declined because we have yielded to the slavish maxim that orators are born, not made. We no longer read the classics. We are not willing to make the study of logic, philosophy, jurisprudence and government, and the art of expression and persuasion the subject of long, patient and conscientious pursuit.

My own profound conviction is that oratory, in the sense here used, is the most useful of all arts; that it has its place in modern life; that its study as an art should be encouraged, not repressed. I agree with Cicero that,

"For as the glory of man is the strength of his mental capacity, so the brightest ornament of genius is eloquence,"

and that more than any other profession it is the duty of the bar, as a profession, to encourage the study and the practice of this high art, to the end that its ancient glory may be renewed, and that it be recalled to that high place of leadership which it once held and which belongs to it as a matter of right.

As Others See Us

"Despite the inroads on what we consider the lawyer's domain, the legal firms are all prosperous and very busy. Today is the day of business being done by big companies in America. The forming, incorporation and reconstruction of these companies give the lawyers continual work, and this work is done by the lawyers solely. Nowhere did I come across any instances of accountants or other unqualified persons doing the legal work in connection with the formation and incorporation of companies such as we unfortunately have in Victoria.

"Through the courtesy of the Dean of the Harvard Law School, Mr. Pound, I met the senior partners of two of the principal legal firms in New York. There were over 50 qualified lawyers in each firm, about ten of whom were partners in the firm. The different members were specializing in the various branches of law, some were doing corporation work, some taxation, some common law, and so on. There is no separate bar in the United States, so all the large firms have a few barristers with them. These firms employ on their staff men trained in banking, and also accountants.

"The partners I met told me that the senior partners of firms like their own make somewhere about £40,000 a year. There is no scale of costs in New York, the price being a matter of arrangement."—Mr. H. C. Luth in "Law Institute Journal," Melbourne, Australia.

Solicitors' Articled Clerks

"A solicitor upon taking an articled clerk usually receives a premium or apprenticeship fee. The amount of this fee, which as a rule, should not exceed 300 guineas, is a matter for negotiation. Some solicitors take articled clerks without payment of a premium, but this practice is not usual. A few good firms are, however, sometimes prepared to take a man of proved ability, as evidenced by the possession of First or Second Class Honours in a Tripos, or other University distinction, free of premium. But the majority of good firms are not prepared to offer concessions of this nature, except in very special circumstances. A clerk paying a premium sometimes receives back a portion of his fee in the form of salary during the last year of articles if he 'makes good' with his firm. Students are particularly warned against taking articles with solicitors who advertise for articled clerks in the press, unless they make full confidential enquiries as to the status of the solicitor and the future prospects in the firm for a clerk when qualified."—From Handbook of the Cambridge Law School, 1928-29.

CURRENT LEGAL LITERATURE

A Department Devoted to Recent Books in Law and Neighboring Fields and to Brief Mention of Interesting and Significant Contributions Appearing in the Current Legal Periodicals

Among Recent Books

A *History of Continental Civil Procedure*, by Arthur Engelmann and others. Translated and edited by Robert Wyness Millar. Vol. VII of The Continental Legal History Series. Boston: Little, Brown & Co., pp. lxiii, 948. $7.00.—In a recently published comment upon American judicial procedure, M. Pierre Le Paulle, of the French Bar, after expressing his amazement at the ineffective manner in which justice is administered in this country, and noting the sentimental regard for common law traditions which makes a private law suit more like a high church ceremony than a business transaction, asks his American interlocutor the very pertinent and natural question:

"Why don't you take advantage of what has been done by the civil law, that governs at least twice as many people as the common law, is two thousand years older, and embodies a much greater amount of human experience?"

To this question various answers might be given, in an effort to rationalize an indifference which is too obvious to be denied. We might point to the different political and social conditions out of which and through which the common and the civil law developed, with a resulting divergence in legal institutions. We might undertake to show how difficult and how unnecessary it would be to introduce foreign elements into a fully articulated and largely indigenous system of law which meets our needs quite satisfactorily and has demonstrated its capacity for responsive growth as new problems present themselves. We might urge the want of any occasion for disturbing a scheme of rights and duties which has become the basis of our social and economic structure. The experience of a people is the vital source of its legal conceptions, and the forcible introduction of principles taken from an alien system of law might have the disintegrating effect of dead tissue in a living organism.

But none of these answers would meet the question in the sense in which it was asked, for M. Le Paulle was dealing only with legal procedure. Here we have nothing to do with the principles which control social and economic relations. We are concerned solely with methods of administration. Rules of legal procedure are no more fundamental in the law than rules for accounting in manufacture or trade. Litigation is merely a means to an end, like transportation, and the same tests should apply to both. No American objects to the use of the Diesel engine because it is of German origin, nor to the radio because it is Italian, and the victims of rabies make no protest against the employment of Pasteur's treatment because it was developed in France. In every field of human activity outside of the law men are constantly searching for new and better methods, overcoming the barriers of language and forgetting the prejudices of nationality and race.

The true reasons why we do not take advantage of what has been done by the civil law in an effort to improve our own administration of justice, are probably two.

The first reason is professional prejudice against new ideas, based on natural conservatism and the monopolistic nature of judicial agencies. This is tending to weaken, and the widespread interest in English legal procedure which has recently developed among American lawyers is one of the most encouraging symptoms of contemporary professional life.

The second reason is ignorance, due to the fact that American lawyers are not usually good linguists, and that no adequate material dealing with continental procedure has been conveniently available in English. No event in recent times has done more to remove this obstacle than the publication of Professor Millar's book on the History of Continental Civil Procedure. In a subject where technical terms play so large a part in the description of processes, and where neither the terms nor the processes have complete analogies in our language or our practice, the task of the translator is extremely difficult. He is required not merely to translate, but through his translation to interpret.

The range of the work is enormous, dealing with French, German, Austrian, Swedish and Italian procedure from their medieval beginnings to modern times, and with Roman procedure throughout its whole course, tracing its influence upon the legal procedure of the Germanic peoples with whom it came in contact. For this purpose Professor Millar has selected for translation and presentation treatises by Arthur Engelmann, professor of law and judge of the Court of Appeal at Breslau, Wilhelm Uppström, for many years a judge of first instance and of one of the Courts of Appeal in Sweden, Rudolf Herrmann, judge of the court of first instance in Silesia, Johann Schwartz, professor of law at Berlin and Halle, Désiré-Ernest Glasson, professor of civil procedure at Paris, Lorenz von Stein, professor of history at Vienna, Giuseppe Salvioli, professor of law at Naples, Lanciotto Rossi, professor of law in several Italian universities, Giuseppe Chiovenda, professor of civil procedure at Rome, and Thore Engströmer, professor of procedure at Upsala. All together they contain a detailed and comprehensive survey of the history and present status of civil procedure in western continental Europe.

To the lawyer trained in the rigid common law traditions which still completely dominate American

procedure, the book will bring an entirely new conception of the variety and adaptability of procedural processes. He will marvel at the enterprise and ingenuity with which continental lawyers have for centuries experimented with new methods of judicial administration. He will be astonished to see how universal are the fundamental problems of litigation and how independent they are of the particular concepts of substantive law which change at each frontier. And finally he will realize at how many points continental experience will directly and convincingly contribute to the solution of problems with which we have been ineffectively struggling.

But while the book is a mine of information and suggestion, it is not the sort of mine that can be stripped with a steam shovel. The rock in which the mineral is imbedded is too hard. Strange nomenclature, unfamiliar processes and situations, the illusive atmosphere of foreign traditions, and the rapid shifting from one land and one age to another, require from the reader the closest attention. Furthermore, the style of continental legal writing tends towards a severity of logic and a brevity and abstractness of statement which is not often found among common law writers who base their texts upon the concrete authority of special cases.

These inherent difficulties, however, are to a great extent neutralized by the prolegomena on The Formative Principles of Civil Procedure which Professor Millar has written as an introduction to the texts which he has translated. Here one finds the most scholarly analysis and explanation of the elements of continental procedure which has come from the pen of any modern common law writer. By its means one is enabled to look at the procedural panorama through the rectifying glasses of a common law interpretation. It serves to give an American orientation to European judicial processes, relating them to the same problems with which our profession is so vitally concerned.

There is no question about the richness of the field for comparative study which is offered by continental court procedure. European experience with collegial trial courts as distinguished from the single judge system which we inherited from England, with methods for sifting issues before trial, with oral pleading, with directive and inquisitorial powers of the judge, with the serial rather than the simultaneous trial of multiple issues, with summary procedure, with discovery by examination of parties before trial, with the delegation of powers to hear and report upon testimony, with hearings in camera, with specialized courts, with review by way of rehearings, retrials and proceedings in error, and with a host of other problems of litigation,—all this experience can contribute the most valuable data upon which to base our own experiments in procedural reform. And to the full extent that this is true does the American legal profession find itself under obligation to the scholarly labors of Professor Millar.

EDSON R. SUNDERLAND.
University of Michigan.

The "Also Rans," by Don C. Seitz. 1928. New York: Thomas Y. Crowell. Pp. xxiv, 338. $3.50.

This book starts out with a comprehensive condemnation of all the presidents from Washington to Harding save only Hayes who was seated by fraud, Harrison (II) who arrived by accident, and Arthur who rose on the ashes of Garfield.

The author apparently assumed it was necessary to pull the victors down if haply he was to succeed in lifting their rivals up. Nothing is easier than to point out the evils in mundane affairs. Nevertheless these pejorative preliminaries would have been far more effective if the writer had not constantly used the opinions of the despised champions to bolster up his exemplars of defeat.

Truth is of various kinds. It is grave and gay, dignified and petty, aristocratic and ordinary, and an aspiring biographer should be able to tell what is vulgar as well as what is great, what is little as well as what is amazing, but it is only indifference or lack of ambition which permits a writer to pick out a group of men, great or near great, and present them trivially. In this volume we find descriptions of minds and of manners. We have too a certain slap-dash animation, but it is the stir of the surface. We miss all suggestion of conscientious character analysis or motivation of idea. Cynicism is the prevailing atmosphere both for the favorites of fate and the luckless losers.

Such a philosophy has much to recommend it, for notwithstanding the statements of the Psalmist certain of the ungodly flourish through life like the green bay tree, since Providence to outward appearances works by a system of averages. Most people who ought to succeed do succeed, and most people who fail ought to fail, like the derelicts before us, but with this mental disposition what profits it to spend so much energy to pedestal the unprosperous?

It may be that the writer hoped to call a new attention to forgotten worthies, to light a new spark in the long-cold cinders. The idea is pleasing and not without merit, yet to serious minded and cultured readers the result is only feebly interesting because the evidence of thoughtful preparation is lacking. The style too is light, often flippant and usually unconvincing. Broad generalizations and undemonstrated judgments are handed down in unimpressive journalese sentences which savor of frivolity and make us question whether the author has really taken his subject seriously.

Should the book appeal to the illiterati? The army records revealed that seventy per cent. of the recruits ceased to grow mentally after the seventeenth year. For these therefore there is little hope of enlightenment. We live in the realm of the half-educated. The number of readers grows daily but the quality does not improve in proportion. The middle class as a body is scattered but headless, well-meaning but aimless, desirous of wisdom but ignorant of the path. The majority are still beguiled by the rays of the reportorial pyrites which glitters glamorously but is not gold. The steam escapes from covered dishes and they postulate food, and so possibly the imperfectly digested pabulum of the "Also Rans" may fill their bellies with a factitious flatulence, but the blood and brain will fail of nourishment.

Chicago. CHARLES B. REED.

The Sanctity of Law, by John W. Burgess. 1928. New York: Harper & Bros. Pp. VI, 335. $3.50.—Dr. Burgess, dean of American historians, has traced the origins of law from imperial edict and papal decree to the pronouncement by a nation of the rules by which it proposes to be governed. Law, to possess sanctity, he urges, must have "its compelling power over the intellect, conscience and will of man." He tells us

again of the long, hard road with the end always just beyond the vision of the race. Those who have confidence that wise changes may be made promptly would do well to retrace with the historian the hard path he describes.

Fifty years ago, the author, already a great scholar, watched the Congress of Berlin and saw the crafty Disraeli outplay Bismarck. He discussed what he thought was a "frittering away of one of the greatest opportunities of human history for the peaceful advance of civilization, and instead thereof the sowing of the seeds of dissension and future conflict"—in other words, he saw and prophesied the British Balkanization of Europe. To that victory of the British Premier he lays all the unhappiness of Europe during the last half century. He therefore sympathized with Germany in the late war and could not see, either now or then, any decent reason for this country taking sides. Now that the frightful conflict is ten years back of us, it may be that other scholars, weighing and testing, may share his views.

He lays great stress on another conviction which he has held since a boy. He was born in Tennessee and served in the Union Army from 1862 to 1864. He thinks the loyal men of the mountain States turned the tide of our Civil War. He is sure that the British were on the side of the South and therefore, when, in October, 1906, he came to Berlin to inaugurate a Roosevelt Professorship of American History and Law in what he calls the greatest of the world's universities, he assured the German Emperor that the United States and Germany would always be friends unless a Southern Democratic administration should ever get back to Washington. Therefore, it was *revanche pour* Appomattox that President Wilson brought us into war on the side of the Allies. This doctrine is so opposed to what we think we know, that we stop to wonder whether Disraeli really planned the Balkanization of Europe, to the end that nations have now been formed that are merely caricatures of nations and lack that dignity and those racial and topographical attributes which are necessary for self-governing and lawgiving states.

Chicago. MITCHELL D. FOLLANSBEE.

A History of American Foreign Relations, by Louis Martin Sears. New York: Thomas Y. Crowell Company. 1927. Pp. xiii, 648. $3.50. In a thoroughly readable survey of American diplomatic history Professor Sears has achieved a reasonable judiciousness of treatment and accuracy of detail without slighting those larger forces and deeper currents of our politics which have materially affected our relations with foreign powers. The long and frequently involved story of new-world diplomacy—from the hazy beginnings of the Colonial period to the end of America's great venture in world leadership under President Wilson—is told in a style which is always clear and sometimes incisive. While primarily a textbook and equipped with considerable material for use in the class-room, the volume cannot fail to interest and instruct the general reader who is looking for something more than a surface account of American foreign relations.

The chapters dealing with the triumph of imperialism, the aggressive diplomacy of President Roosevelt, the career of the dollar as a diplomat, the latest phases in the application of the Monroe Doctrine, the new liberalism of Wilson, and America's part in the World War and the aftermath of peace should be of especial interest to the student of contemporary politics. In dealing with these controversial topics Professor Sears says in the preface that he has endeavored to do "no injustice to the political parties, the economic, social and diplomatic prejudices of the various sections and factions in American history." And while it is true that he has maintained, on the whole, a high level of impartiality in evaluating the motives and appraising the accomplishments of leaders and parties, the author does not hesitate to administer an occasional severe rebuke. Thus, we are told in no uncertain terms that Roosevelt's course of action in the affair of Panama "stultified our own contention in the Civil War that Europe must not recognize the South" and "violated frequent pledges to Colombia dating back to 1846 to recognize her rights upon the Isthmus and to preserve neutrality." In the author's judgment the treatment accorded Colombia is defensible "only, indeed, as an end justifying any means."

It is of course a truism that no secondary work on history, however skillfully constructed or vividly presented, can give the student the same sense of the reality of the persons or the events of the past that he gets from an intimate familiarity with the sources and the words of the actors themselves. It is doubtless with this thought in mind that Professor Sears has endeavored, wherever possible, to let the makers of history tell some of the story in their own words. For example, in recounting the successive steps in the tempestuous negotiations at Ghent in 1814, the author shows how the animus between Clay and Adams, the clash of warring temperaments and the divergence of the economic interests of the East and West complicated an already difficult situation, illustrating his point by the following passage from Adams' *Memoirs:*

"Mr. Gallatin brought us all to unison again by a joke. He said he perceived that Mr. Adams cared nothing at all about the navigation of the Mississippi and thought of nothing but the fisheries. Mr. Clay cared nothing at all about the fisheries, and thought of nothing but the Mississippi. The East was perfectly willing to sacrifice the West, and the West was equally ready to sacrifice the East. Now, he was a Western man, and would give the navigation of the river for the fisheries. Mr. Russell was an Eastern man, and was ready to do the same. I then told Mr. Clay that I would make a coalition with him of the East and the West. If the British would not give us the fisheries, I would join him in refusing to grant them the navigation of the river. He said the consequence of our making the offer would be that we should lose both."

Those who believe that intelligent decisions in the sphere of international relations are more likely to emanate from a nation whose leaders of thought and opinion are adequately instructed in the lessons its own history has to offer—and who does not?—should welcome this solid contribution to the secondary literature of the subject which Professor Sears has made.

PENDLETON HOWARD.

Columbia University.

Signed Articles

As one object of the American Bar Association Journal is to afford a forum for the free expression of members of the bar on matters of importance, and as the widest range of opinion is necessary in order that different aspects of such matters may be presented, the editors of this Journal assume no responsibility for the opinions in signed articles, except to the extent of expressing the view, by the fact of publication, that the subject treated is one which merits attention.

Leading Articles in Current Law Periodicals

Michigan Law Review, November (Ann Arbor, Mich.)—Judicial Power in the United States—Part I, by William W. Potter; Quasi Contractual Relief in Admiralty, by John P. Chandler; The Transferee of a Delinquent Taxpayer, by O. John Rogge.

Georgetown Law Journal, June (Washington, D. C.)—Conflict of Laws in Contracts of Sale, by Gleeson E. Robinson; International Radio Relations, by W. Jefferson Davis; Searches and Seizures Under the National Prohibition Act, by J. Newton Baker; Voir Dire Examination of Jurors: I, The English Practice, by Roger D. Moore; Controversies with the United States: II, by O. R. McGuire.

University of Pennsylvania Law Review, November (Philadelphia)—The Law of Third Party Beneficiaries in Pennsylvania, by Arthur L. Corbin; Availability of Duress and Fraud Upon the Principal as Defenses to the Surety and Guarantor, by Earl C. Arnold; The Right to Strike, by Alpheus T. Mason; Bulk Sales Laws: A Study in Economic Adjustment, by Thomas Clifford Billig.

Washington Law Review, October (Seattle, Wash.)—The Permissibility of Comment on the Defendant's Failure to Testify in His Own Behalf in Criminal Proceedings, by Leslie H. Dills; Statutory Redemption Rights, by F. C. Hackman.

Kentucky Law Journal, November (Lexington, Ky.)—Stockholders as General Creditors, by Clarence G. Miles; Powers and Authorities of the Governing Boards of State Colleges and Universities, by R. R. Ray; Wrongful Delivery of Deed in Escrow, by W. Lewis Roberts.

Columbia Law Review, November (New York City)—The Effect of Subsequent Misconduct Upon a Lawful Arrest; by Francis H. Bohlen and Harry Shulman; Equitable Relief for Unilateral Mistake, by Edwin W. Patterson; The Constitutionality of Investigations by the Federal Trade Commission; II, by Milton Handler.

The Law Quarterly Review, October (London)—The Conception of Servitudes in Roman Law, by Professor W. W. Buckland; Blackmail and Consideration in Contracts, by the Editor; The Jurisdiction of the International Court of Justice Over Concessions in a Mandated Territory, by Norman Bentwich; A Note on Contractual Restraint of Liberty, by Sir Maurice S. Amos; A Periodical Menace to Equitable Principles, by Harold G. Hanbury; Usury and Annuities of the Eighteenth Century, by Sybil Campbell; The Young Bentham, by Carleton Kemp Allen.

Yale Law Journal, November (New Haven, Conn.)—Third Parties as Beneficiaries of Contractors' Surety Bonds, by Arthur L. Corbin; Revision of the Negotiable Instruments Law, by Roscoe B. Turner; The Status of Management Stockholders, by Franklin S. Wood.

Philippine Law Journal, October (Manila)—Suggested Reforms in the Philippine Corporation Law, by Juan T. Santos; May Corporations Invest Their Funds in Other Corporations Under the Philippine Law, by Vicente Ampil.

Virginia Law Review, November (University, Va.)—International Awards, by Jackson H. Ralston; The Supreme Law of the Land, by George W. Wickersham; Character Evidence in Virginia, by Ralph T. Catterall.

Illinois Law Review, December (Chicago)—Bad and Good Federal Legislation Pending, by John H. Wigmore; The Constitutional Aspects of Municipal Home Rule in Illinois, by Albert R. Ellingwood; Law as a Body of Subjective Rules, by Earle H. Ketcham.

The Lawyer & Banker, and Central Law Journal, November-December (New Orleans, La.)—The Title Insurance Policy: What It Should Contain, by Anthony H. Rutgers; Guaranteed Constitutional Rights, by M. C. Taft; The Lien of Federal Court Judgments, by George S. Parsons.

University of Cincinnati Law Review, November (Cincinnati)—Restraints on Alienation, Spendthrift Trusts, and Indestructible Trusts in Ohio, by Charles C. White; Review by the Ohio Public Utilities Commission of Local Regulatory Ordinances and Orders, by Irwin S. Rosenbaum; Ancestral and Non-Ancestral Realty under the Ohio Statutes of Descent, by Lewis M. Simes.

Law Notes, November (Northport, N. Y.)—Rights of Re-entry of Alien Returning to United States after Temporary Absence, by W. A. Shumaker; Separation of Races in Schools, by Hoke F. Henderson.

University of Pennsylvania Law Review, December (Philadelphia, Pa.)—The Effect of an Unconstitutional Statute in the Law of Public Officers: Liability of Officers for Action or Non-action, by Oliver P. Field; The Tort Liability of Charities, by Lester W. Feezer; The Filed Rate in Public Utility Law; a Study in Mechanical Jurisprudence, by Gustavus H. Robinson.

Canadian Bar Review, November (Toronto)—Domicile of a Married Woman in Relation to Divorce, by F. D. Hogg; La Reparation Pecuniaire Du Dommage Moral, by Maitre Armand Dorville; The Saskatchewan Surrogate Courts (Part IV), by A. Gravel.

"Every Man His Own Lawyer"

[NOTE.—The Institute of Transport, the Grocers' Institute, Bankers, Accountants and others are making a certain amount of legal knowledge essential for admission to their staffs.]

There's a dismal future looming for the lawyer,
Who will dominate humanity no more;
Soon eminent K.C.'s will be forced to tout for fees
And solicitors beg work from door to door;
For tinkers, soldiers, sailors, dukes and dustmen
Now spend their leisure time on legal tomes,
And the law of costs and courts and of testaments and torts
Is "lingua franca" in a million homes.

The universe will soon be very different
When each man lives on strictly legal lines,
And former legal giants will starve for lack of clients,
And the revenue will fail for lack of fines;
When Corydon pursues his dimpled Daphne
He will understand exactly what to say:
With forensic erudition he will "file" his first "petition"
And address the lucky damsel in this way:—

"Without prejudice, Belovéd, I adore you;
Without prejudice, please name the happy day;
In the wise eyes of the law I am not a man of straw,
For I've got some personalty stowed away;
I've an interest in remainder in some settled real estate
And a leasehold messuage at a modest rent."
Says the lady with the dimple, "If you'll purchase the fee simple
And redeem the tithe and land-tax, I consent."

For women, too, must learn the lawyer's jargon.
Oh, tackle contracts in your early teens!
'Twill be no use looking pretty if you haven't studied "Chitty"
And don't know what "reversionary" means;
So dig your comely noses into "Stephens,"
Or soon you'll be out-distanced in the race;
However well you play an' sing, read up the new conveyancing.
And understand the "Rule in Shelley's Case."

Bookshops will change their stock of airy trifles
For weighty works that legal doctrines teach;
For the sheik of modern fiction is outside the jurisdiction
Of courts in which he might be sued for "breach";
Fashion notes will have no value for the flapper
Who is reading up "Real Property" at home,
Nor the fiercest "penny dreadful" for the young man with his head full
Of "Justinian" and the Codes of Ancient Rome.

No wonder that our barristers look anxious
And seek oblivion at another bar,
And each six-and-eightpence-taker wants a job as cook or baker,
Or tries to learn to be a movie-star.
The prospect certainly is drear and dreadful,
But pity yet may stir the public soul
When it's harrowed by the view of an ever-lengthening queue
Of lean-faced lawyers waiting for the dole.

—London "Punch."

MAGNA CARTA

Revival of Interest in Antecedents of Our Constitution—Characterization of Magna Carta by Various Writers—The "Law of the Land" and Its Equivalent in American Constitutional Instruments, "Due Process of Law"—The Idea of a Fundamental Law to Which Statutes Must Conform, the Principle of Separation of Church and State, the Basis of Our Representative System, All Date Back to Magna Carta*

By Hon. William D. Guthrie
Member of the New York Bar

IT is a notable fact that it has been considered of sufficient popular interest to broadcast to radio audiences a review of an historical subject as ancient as the Great Charter of Liberties granted by King John of England in 1215, commonly known by its Latin name of Magna Carta, in which language it was written. Too often is it assumed that we Americans are indifferent to the origin and antiquity of our institutions. The present revival of curiosity about the antecedents of our constitutions is a manifestation of the truth, emphasized by Viscount Bryce in his American Commonwealth, that everything that has power to win obedience and reverence must have its roots deep in the past and that the more slowly institutions have grown so much the more enduring are they likely to prove. It is, therefore, highly fitting that we should indulge in the present retrospect, which carries our minds back more than seven hundred years to the days when the foundations of our constitutional liberties were being laid, and that we should realize that the principal existing restraints and limitations upon the executive, legislative and judicial branches of our governments, federal and state alike, and the chief existing guaranties of civil liberties and individual rights are not the original conceptions or experiments of the framers of our constitutions; but that their origin is in the distant past, and that they spring from principles that were developed in England and in large measure embodied in the Great Charter of Liberties granted to the barons, clergy and freemen of England in the Thirteenth Century. Indeed, no one can fully comprehend the meaning and content of some of the most important and far-reaching of the provisions contained or implied in American constitutions without a knowledge of English constitutional history.

The granting of the Great Charter of Liberties by King John is often said to be the greatest event in the history of England. Bishop Stubbs characterized it as "the proudest act of the national drama." With Magna Carta, as Macaulay declared, commences the history of the English nation; and the reconciliation and unification of the two peoples—Norman and English—dates from that event and the realization at that time by all classes that their vital and permanent interests lay in unity of action as against abuse of governmental powers by the King and aggression and tyranny on his part.

There is not time now to trace the antecedents or causes of the Great Charter, nor even to outline the civil war that culminated in the meeting of King John on June 15, 1215, with the representatives of the barons, clergy and people on a small island in the River Thames in front of the famous meadow known as Runnymede, where the barons and their army of followers were encamped, facing the King's forces arrayed on the opposite bank of the stream.

The Great Charter of 1215 then wrung by force from King John was solemnly confirmed no less than thirty-seven times by seven Kings of England. It naturally became in the eyes of Englishmen the embodiment of their liberties, the foundation of all subsequent claims of personal rights as against the King, and the stirring battlecry against oppression and tyranny. The constant repetition from generation to generation of its principal pledges as liberties and rights helped powerfully among all classes to form the national character and to create the tradition of fundamental and inalienable liberties and rights common to all, which no power should violate—whether King or Parliament—"and as such had a profound and lasting influence on the imagination—in every sense of the word—of succeeding ages" not only in England but in her American colonies. Throughout the Seventeenth and Eighteenth Centuries the Great Charter was worshipped by such patriots as Hampden, Blackstone and Burke, and all England regarded it as the source and embodiment of the political and personal liberties and rights of every class. During these two centuries, its spirit dominated political thought on both sides of the Atlantic. "It had become," as Trevelyan says in his History of England, "the symbol for the spirit of our whole constitution." The reissue of the Great Charter in 1225, by King Henry III, still remains on the English statute books as in full force and effect, so that an English historian has said that every act of Parliament appearing on the statute rolls is in a sense an act amending Magna Carta.

The famous English legal historians Pollock and Maitland describe Magna Carta as "a sacred text, the nearest approach to a fundamental statute that England has ever had," and Blackstone declared that its thirty-ninth chapter alone would have merited the title that it bears of the Great Charter. Judge Hughes in his recently published lectures, entitled "The Supreme Court of the United

*This is one of a series of addresses on "Fundamentals of the Law" which were broadcast in the spring by The National Broadcasting Company, Station WJZ. This address was broadcast Tuesday evening, April 3, 1928.

States," refers figuratively to the phrase "law of the land" in that chapter as having been "the citadel of liberty." It is in fact the most famous of all the chapters of the Great Charter, and it contains the most important and far-reaching provision from a constitutional and judicial point of view throughout our own history. In chapter 39 is to be found the famous term "by the law of the land"—or in the original Latin *per legem terrae*; and it was then employed in the following context:

> "No freeman shall be taken or imprisoned or disseised, or outlawed, or exiled, or in any wise destroyed; nor shall we go upon him, nor send upon him, but by the lawful judgment of his peers or by the law of the land."

In the reissues of Henry III, in 1217 and 1225, after the word "disseised" were inserted the words "of his freehold or liberties or free customs."

Two hundred and thirty years ago the Royal Governor of the then English Colony of New York is reported to have declared to its legislature that "There are none of you but are big with the privileges of Magna Carta." And even more so today may it truly be affirmed that there are no Americans but are big with the privileges of Magna Carta. In truth, it is the principal and noblest purpose of every American constitution to provide that the spirit and efficacy of these privileges shall endure forever, so far as lies in human power to provide.

The phrase "the law of the land" is not contained in the Constitution of the United States or in any of its amendments, nor is it contained in most of the state constitutions; but its equivalent is to be found in the phrase "due process of law," which latter term, under the rule of interpretation, long settled by the Supreme Court of the United States as well as by the state courts, is in modern meaning and legal force and effect exactly the same in content and effect as the term "the law of the land."

The first use of the phrase "due process of law" in an American constitution was in the Fifth Amendment to the Constitution of the United States, ratified in 1791. None of the state constitutions then in existence contained the phrase, but nearly all of them had its equivalent in the term "the law of the land," as did likewise the Ordinance for the Government of the Northwest Territory enacted by Congress in 1787. The New York Charter of Liberties of 1683 used the language, "being brought to answer by due course of law." The term "due process of law" was not contained in the first New York Constitution of 1777, and it appears for the first time in the State of New York as a constitutional provision in the Constitution of 1821, although it will be found in the New York Bill of Rights of 1787, which was enacted as a statute. Both terms, "the law of the land" and "due process of law," are used with the same meaning in the present Constitution of the State of New York. Thus, "the law of the land" is found in section 1 of Article I, and "due process of law" in section 6 of the same Article. The different date of origin of each section seems to account for the difference in terminology.

By the phrase "the law of the land" in chapter thirty-nine of the Great Charter of 1215, the existing liberties, free customs and property rights of Englishmen were intended to be guaranteed and perpetuated as against the power of the Crown; but exactly what those liberties, customs and rights were then understood to be or their extent is not now capable of accurate exposition. The phrase was evidently intended at the time to refer to procedure as well as to substantive law. The earliest use in England of the term "due process of law," so far as I have been able to trace, is to be found in a statute of the year 1354, 28 Edward III, which provided that no person should be condemned without being first brought to answer by due process of law, the exact wording, in the quaint Norman-French of the day, in which all English statutes were then enacted, being "*saunz estre mesne en respons par due proces de lei.*" As in the same statute of 1354 the Great Charter of 1215 was being confirmed, "to be kept and maintained in all points," the provision in regard to *due proces de lei* was, it is reasonable to assume, intended to supplement the term "the law of the land" contained in the Great Charter so as expressly to include procedure, some doubt having probably arisen upon this point.

At the present time a majority of the state constitutions, including most of the recent constitutions, contain the term "due process of law." As that term is the one used in the Fourteenth Amendment to the Constitution of the United States, which is applicable to all the States, it would be preferable, for the sake of uniformity and certainty, hereafter to employ it in our state constitutions. Moreover, the phrase "due process of law" seems to me to lend itself more readily than "law of the land" to indicating the modern scope and content of the constitutional provision if we will define or understand the words "due process" to mean *just, equal and appropriate method or manner* of dealing with the particular subject-matter, and disregard the limited but current meaning of the word "process" as a judicial writ, order, or other legal procedure.

The meaning and exact effect of the term "due process of law" or its equivalent "the law of the land" have never been attempted to be completely defined by the Supreme Court of the United States or by our state courts; and this is fortunately so, because no one can foresee the innumerable aspects of the application of this constitutional guaranty that will arise in the constantly increasing complexity of our lives. It must suffice to declare generally and more or less vaguely that the provision requires just and equal laws that have a reasonable relation to some purpose within the competency of the legislative power, that are not arbitrary but reasonably adapted to a legitimate end, that conform to established principles of private right and distributive justice, and that observe those general rules which have been established in our system of jurisprudence for the protection of personal rights and were recognized at common law as essential to the orderly pursuit of happiness by free men.

I regret that the time allotted tonight will not permit me to cite particular cases so as to illustrate the comprehensiveness, grandeur and sacredness of the American conception that "no person shall be deprived of life, liberty or property without due process of law." The shield of this constitutional guaranty is immeasurable and of unique pervasiveness. Its wise and impartial enforcement is the principal glory of our judiciary. Through the Fourteenth Amendment, the provision has for more than half a century nationalized personal liberty and the equal protection of the law, and it has

effectively protected all classes, poor and rich, weak and strong, against injustice, oppression, spoliation, discrimination and tyranny. As long as this mandate continues to be applied in the faith and spirit with which our courts have construed it in the past, so long will Americans remain free men exercising all the personal liberties that do not conflict with the equal rights and due protection of others and the interests of the State.

First and foremost among the cardinal principles of Magna Carta was the idea that the individual had natural rights as against the King, and that those rights were secured to him by fundamental laws which ought to be permanent.

Thus, the idea that there were fundamental laws of the land that should be unalterable and that any governmental regulation, edict, or statute to the contrary should be treated as void and null, is declared in the first chapter of Magna Carta, in which King John grants to the freemen of the kingdom "all the underwritten liberties, to be had and held by them and their heirs, of us and our heirs forever," and in chapter sixty-one, where the King covenants that he "shall procure nothing from any one, directly or indirectly, whereby any part of these concessions and liberties might be revoked or diminished; and if any such thing has been procured, let it be void and null." And confirmatory of this covenant is the statute enacted by Parliament in 1369, with the consent of Edward III, to the effect that the Great Charter should be "holden and kept in all points, and if any statute be made to the contrary, that shall be holden for none."

The spirit of this declaration breathes in every American constitution. We have here the antecedents of the doctrine, underlying the whole structure of American constitutional law, that any statute in conflict with a constitutional provision, shall be "void and null" in the language of the Great Charter, or "holden for none" in the language of the statute of Edward III. Chief Justice Marshall in the great case of *Marbury* v. *Madison*, in 1803, was but following these ancient declarations when, speaking for the Supreme Court of the United States, he settled—it is hoped for all time—the beneficent and indispensable doctrine that a statute contrary to an American constitution must be treated by the courts as void and null and holden for none: in a word, as unconstitutional and as such unenforcible.

Of an importance no less vital than the idea of a permanent law of the land preserving and safeguarding the fundamental rights and liberties of the individual, was the declaration in the first chapter of the Great Charter that the English Church, *Anglicana ecclesia*, should be free from interference on the part of the Crown and that the rights of the Church should be entire and her liberties inviolable. In this provision we have the germ of an independent church and of the salutary American doctrine of the separation of Church and State.

But the provisions of the Great Charter relating to the administration of justice were undoubtedly those which were of chief concern to the people at large, as they were certainly, if observed, those most essential for the security of their persons and liberties. In these provisions of Magna Carta we find the principle of the independence of the judicial power and the soundest and highest conceptions of the administration of justice, conceptions far in advance of those to be found in any other document or enactment of that age. The framers knew that it was in the courts of justice that the King of England would have to keep his promises, if at all, and that the King's government would only be as good as his judges were learned, independent and impartial.

The framers had grasped the great truths that jurisprudence is a science; that the law must be administered by men learned in that science and bound to obey its rules; that uniformity, certainty and impartiality are essential to the administration of justice, and that the highest political liberty is the right to justice according to law and not according to the will of the judge or the judge's master, or according to the judge's individual discretion, or his notions of right and wrong. They had also arrived at the conclusion that every Englishman was entitled as of absolute right to a day in a court that would hear before it condemned, that would proceed upon notice and inquiry, and that would render judgment after a fair trial and then only according to law. The framers of Magna Carta instinctively felt, if they did not clearly perceive, that the law is infinitely wiser than those who may be called upon to administer it, and that, as Aristotle had declared fifteen hundred years before, "to seek to be wiser than the laws is the very thing which is by good laws forbidden."

It was Magna Carta that established in England the doctrine that the law should be administered in fixed courts by learned and independent judges bound to obey the law, the language being: that all judges should be "such as know the law and mean duly to observe it," a provision that ought to be contained in every American constitution; it was in Magna Carta that the King covenanted that "to no one will we sell, to no one will we refuse or delay, right or justice," which in time came to be interpreted as a universal guaranty of free and impartial justice to all classes, high and low; and it was Magna Carta that in practical effect ultimately established the important constitutional doctrine of the supremacy of the law over every official however high, so that no one shall be above the law.

Chapters twelve and fourteen of Magna Carta dealt with the subject of taxation, and they laid the foundation of our representative system and of the separation of the legislative from the executive power. The only legislative function that the people of England for centuries contemplated as affecting them or as likely to create any grievance was that of taxation. In the controversies in regard to taxation subsequently arising in the Seventeenth Century whether in Parliament or in the courts, it was always insisted that Magna Carta prohibited certain forms of taxation without the consent of Parliament in the exercise of its legislative power, just as in the Eighteenth Century our ancestors here in America contended that the spirit, if not the letter, of Magna Carta prohibited taxation without representation, that is, prohibited the imposition of taxes except by a legislative body in which the taxpayers were represented.

In conclusion, I shall quote an impressive passage from the History of England by Sir James Mackintosh, who, in referring to the greatness and glory of Magna Carta, used the following language: "To have produced it, to have preserved it, to have

matured it constitutes the immortal claim of England upon the esteem of mankind. Her Bacons and Shakespeares, her Miltons and Newtons, with all the truth which they have revealed, and all the generous virtue which they have inspired, are of inferior value when compared with the subjection of men and their rulers to the principles of justice, if indeed it be not more true that these mighty spirits could not have been formed except under equal laws nor roused to full activity without the influence of that spirit which the Great Charter breathed over their forefathers."

RESISTANCE IS NOT NULLIFICATION

BY HENRY ALAN JOHNSTON
Member of the New York City Bar

UNDER the title "Prohibition and Nullification" in the October American Bar Association Journal, Mr. Lukens, as an answer to "the attempt on the part of some opponents of prohibition to give a philosophical reason for disobedience to the law," argues that "the widespread disregard of a law does not impair its legal validity." That a widespread disregard of a law does not impair its *legal* validity must be immediately recognized by every thoughtful lawyer; but such a statement is not an answer to the philosophical reason for the widespread disobedience. A law may be legally valid and at the same time in such conflict with the popular will as to render it practically invalid because of a widespread disregard; and if the particular law is so framed or so uttered as not to permit of amendment by ordinary legislative methods it becomes subject to practical nullification by general disregard or, if need be, by open rebellion.

The term nullification as applied to this process of individual violation of a law by vast numbers of the citizenry is a loose expression borrowed from a conflict of constitutional interpretation which was definitely settled in the nineteenth century, and has no more applicability to the present situation than it would have had to the refusal of the Colonists to obey the Stamp Act of 1765. For a historical parallel the latter is more apt. The Stamp Act, it will be recalled, aroused bitter antagonism among the Colonists; enforcement was a failure; it created disrespect for the Crown and Parliament, followed by hatred and contempt for the Government, and eventually open rebellion.

"Law," said James M. Beck, in his address on The Future of Democratic Constitutions delivered before the Bar Association in 1926, "is only the reasoned adjustment of human relations, and its authority consists only in its reasonableness and service to the common weal. When a majority imposes upon a minority some oppressive law which transcends the fair province of Government the minority—if they have the spirit of free men—protest as they would against the tyrannous edict of a king."

"There is the law and no matter what you may think of it, it is the supreme law of the land and must be obeyed." Thus speak the prohibitionists.

"But," says the historian, "Governments are instituted among men to protect the citizen in the enjoyment of life, liberty and property; and when the Government assumes other functions which properly belong to the realm of religion, it is usurpation and oppression."

Now, then, what happens when a law has been enacted which violates the purposes of government as understood by American thought and tradition? Is a strict adherence to that law a test of a citizen's loyalty to his Government? Obviously no; such a theory has never been accepted by the Anglo-Saxon in the history of his jurisprudence, and the British Constitution today is a living denial of that theory. There is nothing sacred in a law as such. No consecration takes place upon the enactment of a statute by a State or the National Legislature which makes of that Act a holy and unalterable decree. Indeed, the history of the race and the history of the American Republic are copious with examples of unwise legislation which has been unenforceable and which has become a dead letter. The Declaration of Independence, the birth certificate of our Nation, cites no less than nine specific laws which at that time were the supreme law of the land and to which the colonists not only refused obedience, but to the support of their deliberate disobedience pledged their lives, their fortunes and their sacred honor. Laws are to be discovered, not made.

The sanction for all law in a free country is public opinion. The difference between the Volstead Act and the laws directed against conduct which the general public condemns is obvious. The prohibitionist who says that those who advocate the repeal of the Volstead Act because it is unenforceable might just as well advocate the repeal of laws forbidding murder and larceny because they too are not thoroughly enforced displays a lack of logic which can be accounted for only as the effect of fanaticism upon one's mental processes. The fact that a law is unenforceable is no reason in itself for the repeal of that law, but when a law has been enacted which a large body of the citizenship, even though they may be less than a majority, openly ignore, and which is freely violated in the offices, in the homes and in public, by many honorable, substantial, and otherwise thoroughly law abiding citizens, we have very strong evidence that there is something fundamentally wrong with the law.

Americans are not by nature a lawless people. Reasonable laws no matter how trivial or discon-

nected they may be with any moral obloquy are willingly obeyed. The laws against spitting in public places, although that was a common practice a few years ago, and although it involved no moral turpitude, are respected and obeyed purely because they are recognized as a reasonable regulation for the good of society. Men willingly undergo a curtailment of their own liberty where their acts may endanger others, while strongly resenting any interference with their liberty where their acts only endanger their own lives. In the one case they are conscious of a due regard for the welfare of Society, in the other their attitude is, "It is nobody's business but my own. If I wish to drink it is my own affair; if while in my cups I tread on my neighbor's toes or commit some act detrimental to society in general I expect to pay the penalty." Thus State laws for the regulation of the traffic in intoxicating liquors have met with general public support as being necessary for the orderliness and protection of society and an acknowledged governmental function; whereas the attempt to regulate the purely personal habits, thoughts and morals of the individual by law have always met with antagonism.

Self discipline is not a thing that can be imposed by law. In boy's schools and in military organizations it may be to some extent enforced; but that is not in fact true discipline; it is rather a coerced regimentation. Such regulations are not suited to civil government, and if attempted in civil life are apt to lead to open contempt and rebellion.

Now, it may be, that with the changes which have taken place in civilization due to the greater dependence of man upon his fellowmen, and the greater duty that the individual therefore owes to society in general, one's own individual health and his own individual morals have become a matter of public concern to such an extent as to warrant coercive laws of some kind. Certainly the trend of modern legislative activities gives plausibility to such a theory. Restrictions which were not dreamed of a hundred years ago touching the regulation of our daily lives in the most minute particulars, are today recognized as reasonable interferences with individual liberty for the good of society. Whether this tendency to regulatory legislation has overrun its indicated necessity and will be followed by a reaction towards the laissez-faire policy or whether governmental interference and regulation are merely in their first stages and have yet to develop into the practical regulation of all individual conduct and corporate enterprise is an interesting subject for the consideration of the political philosopher. As Lecky says (Democracy and Liberty, Vol. II, p. 149, 1896):

"To attempt to guard adult men by law against temptation, and to place them under a moral tutelage, may, no doubt, in particular instances prevent grave evils, but it is a dangerous precedent and a bad education for the battle of life. There is a specious aspect of liberalism in a proposal to submit such questions to a popular vote; but in truth this is a pure delusion. The essence of real liberty is that every adult and sane man should have the right to pursue his own life and gratify his own tastes without molestation, provided he does not injure his neighbors, and provided he fulfills the duties which the State exacts from its citizens. If, under these conditions, he mismanages his life, the responsibility and the penalty will fall upon himself; but in a perfectly free State the law has no right to coerce him. Violations of liberty do not lose their character because they are the acts, not of kings or aristocracies, but of majorities of electors. It is possible, as many are coming to think, that unqualified freedom is a less good thing than our fathers imagined; that other things may be more really important, and that it is needful and expedient in many ways to restrain and curtail it. But at least men should do so with their eyes open, without sophistry, and without disguise. The strong tendency to coercive laws on all matters relating to intoxicating liquors, to the restriction of freedom of contract, to the authoritative regulation of industry in all its branches, which is so apparent in modern democracy, may be a good or a bad thing, but it is certainly not a tendency in the direction of liberty."

Whatever may be the future course of such legislation, the tendency today is certainly towards the restriction of personal liberty, and the only check on that tendency is enlightened public opinion and the extent of the willingness of the mass of the people to subordinate their liberty for the good of the society of which they recognize themselves a part. In other words, public opinion and support of the law by general cooperation in its enforcement is a sort of test or yardstick by which to gauge the extent to which such legislation might proceed; its non-enforceability is the safety valve which comes into play when public opinion is not strong enough to support the pressure. Taking this view of the matter it is apparent that the reiterated cry for enforcement is but an exhortation that falls on calloused ears, and that the failure of this particular law is no more the fault of the people today, than the failure of the Stamp Act was the fault of those New England men who held a famous tea party in Boston Harbor a century and a half ago. Oppressive and unreasonable laws always will be unenforceable among liberty-loving people.

But whatever may be the wisdom of any particular law of this nature, it must be admitted by every Constitutional lawyer that the right of the people to regulate these matters from time to time in accordance with their ideas through their chosen representatives is a right which adheres in the republican form of government, and which should not be cut off forever by an amendment to the Charter which prescribes and guarantees that form of government.

Review of Recent Supreme Court Decisions

(*Continued from page 31*)

reduced rates are confiscatory and repugnant to the Fourteenth Amendment are not sufficient.

In order to invoke the constitutional protection, the facts relied on to restrain the enforcement of rates prescribed under the sanction of State law must be specifically set forth, and from them it must clearly appear that the rate would necessarily deny to the plaintiff just compensation and deprive it of its property without due process of law. . . .

The complaint fails to show any joint interest or right in or to the business covered by the rates or the protection sought to be invoked. And it fails to show that the business in Missouri of each is so well and economically organized and carried on that petitioners are entitled, as of right protected by the Constitution, to have premiums amounting in the aggregate enough to yield a reasonable return or profit to all the companies.

The learned Justice concluded his opinion by calling attention to the rule that state-made rates will be set aside as confiscatory only in clear cases and that no facts were disclosed here which would warrant an interference with the rate fixed by the state.

The case was argued by Mr. Charles E. Hughes for the petitioners and by Messrs. John T. Parker and Floyd E. Jacobs for the respondent.

LAW IN SPACE—II

By Charles P. Megan*

THE marriage of the first cousins is unlawful in Illinois, but lawful in New York. If two citizens of Illinois, first cousins, while temporarily residing in New York, marry, and then return to Illinois, their marriage will be held valid here, notwithstanding that our statute expressly declares such a union "incestuous and void;" although a *polygamous* marriage, even if valid where performed, would not be recognized here. The general assembly of Illinois cannot legislate for the common conscience of mankind. "Any nation," said John Marshall, "may by statute declare an act to be piratical which is not so by the law of nations; and such an act is punishable only by that particular state and not by any other governments."

So Gretna Green marriages, performed by a drunken blacksmith, however grievous to the feelings of the parents of English heiresses, were unimpeachably good in England, because good where performed. Now one of the parties must have lived in Scotland twenty days.

However, if first cousins go through a marriage ceremony *in Illinois*, the parties will not be regarded by *any* state as married. The domicil of the parties makes no difference; a marriage, to be recognized extraterritorially, must be valid where performed; if not good there, it is not good anywhere, and will be annulled upon application to a court having jurisdiction,—not always an easy matter to decide, as there is a metaphysical question involved. This might seem to be the place to fight over again the "second battle of Blenheim," the Marlborough annulment case, but unfortunately it is not relevant, as no rights were there involved which could come before the courts of any state. In the East, where *personal* law still reigns supreme, it would or might be different. Divorces by Jewish rabbis in accordance with the Mosaic law,—even Mohammedan divorces, effected by the simple handing of a formal paper by the husband to the wife,—have been held good repeatedly in England. The legitimacy of an Ottoman subject, a Roman Catholic, living in Cyprus (an English dependency), rests on the canon law; the succession to the property of a Chaldean Catholic upon *his* law; and the rights so fixed will be enforced by the civil courts of other countries in due course. But if the courts of the state of Illinois declare A. and B. married, and a church court annuls the marriage, and A. thereupon marries again, he is guilty of bigamy. His church decree may protect him from ecclesiastical censure (though most probably not, as it is his duty to render unto Caesar the things that are Caesar's), but it will be absolutely valueless as a defense to a criminal prosecution, or a civil proceeding either, in the courts of Illinois. Conversely, if the courts of Illinois annul the marriage of C. and D., and a church court declares them still husband and wife, they may remarry without offense, so far as the state of Illinois is concerned, though their re-marriage will be a violation of the laws of their church, for which the church may censure or expel them.

The general public is naturally *interested*. It may even be *affected*, as it is by anything which has to do with the welfare and happiness of any citizen, or of any body of citizens. If it should be announced some day that a great church, or a great fraternal society, or a great university was deliberating whether to dissolve and go out of existence, the decision of the question would be watched with deep concern by all citizens, but the state would have no legal interest, and could do nothing one way or the other. In the absence of a dispute over *property* rights, there would be nothing cognizable by any court. It is the same with a marriage annulment by the authorities of a church.

The Marlborough case, then, as I have said, is not relevant to my subject, but I may discuss an annulment case that is. Miss S., a Scotch lady, married one von L., an Austrian subject, in Paris in 1897, and the couple went to Wiesbaden to live. After the war, the British equivalent of our alien property custodian claimed Mrs. von L.'s personal property, which was in the hands of her Scotch bankers. She thereupon discovered a flaw in the French marriage, and she applied to the courts of the matrimonial domicil to have the marriage declared null and void. The Wiesbaden court entered a decree to that effect. Her bankers asked the Scotch courts to say whether they should turn over the property to her or to the custodian, and last year the case went to the house of lords, whose decision was that the courts of Great Britain must consider Miss S.'s status to be what the courts of her domicil declared it to be, and that therefore she was not an Austrian but a British subject, and the alien property custodian had no right to her property. The marriage having been invalid when and where performed, was invalid everywhere, and Miss S. was never von L.'s wife.

There remains the possibility of citizens of Illinois leaving the state and going to another state to be married, to evade our law. Two principles must be noticed. The first is that, a state's jurisdiction being territorial, it will be presumed that the state is not attempting to legislate beyond its jurisdiction; when Illinois punishes, or undertake to punish, murder, that means murders committed in Illinois; when it forbids the holding by religious corporations of more than a certain quantity of land, it does not intend to restrict the holding of more land in another state by a religious corporation of that state, and an Illinois will, making such a gift, will be valid. Therefore, when the state of Illinois forbids the marriage of first cousins, it is forbidding the marriage *in Illinois* of first cousins, unless the statute expressly says otherwise. So when Illinois forbade the re-marriage of divorced persons within a year, that could only mean their re-marriage *in Illinois*, and, as Crown Point is close at hand, our legislature ultimately repealed the law, "for the better prevention of scandals." Especially since there is another principle involved,—the steady policy of all civilized states to support marriage; and there

*Continued from Dec. 1928, issue. Address delivered before the Chicago Literary Club Oct. 8, 1928. This is the concluding installment.

are, or may be, third parties, innocent third parties, interested; legislatures and courts have had to choose between two evils, and have chosen to see their laws evaded with impunity rather than to break up new homes and bastardize children. The plan of having what lawyers call an interlocutory decree entered in a divorce suit, and deferring the final decree for a year, seems to accomplish all the purposes intended.

* *

The continent of Europe shows signs of reverting to nationality as a principle governing the creation and enforcement of rights. A French statute of 1921 provides for the government of the provinces recovered by France from Germany. A Frenchman by origin, either in Alsace or in Paris, is now governed by French law, whereas Alsatians and Lorrainers are governed by the law of their community of origin, "without the slightest consideration of domicil." Today, it has been acutely observed,—read Professor Brierly on this,—nations like Italy and France, which scarcely dare to loosen their hold on their citizens abroad, for fear of diminishing the man-power available for military service, are all for the *ius sanguinis*, —the law of nationality; while England, and the United States, and South America, for the opposite reason, are for the *ius soli*,—the "law of the soil,"—territorial law. It is land-power *versus* sea-power.

Bishop Agobard is not so far behind the times, after all. Here in Chicago five men may be sitting together, or walking about together, and all governed by different laws. There is still considerable scope for *personal* law; in many cases the question being only whether we shall apply the law of the person's domicil or the law of his nationality. One or the other he carries with him, for many purposes, wherever he goes.

But in any event, even with us, as we have seen, the law of domicil does not occupy the whole stage. An accident quite similar to the falling of the Bridge of San Luis Rey occurred in Colorado a few years ago. The law-suits that arose out of the deaths were tried in Chicago. A bank in the state of Washington failed and the stockholders came under the usual double liability. Many of them lived here, and suits to enforce the liability were started by the officials of the state of Washington in the municipal court of Chicago. I have seen two stories in the newspapers to the effect that the United States government is contemplating suits in the Canadian courts against American citizens who left the country without paying their income tax. It has been pretty well agreed in the past that one country will not enforce the penal, revenue, or "political" laws of another.

Contracts, of course, are the breath of business. Where a contract is made in one state, between citizens of two other states, to be performed in still a fourth state, or a foreign country,—a common enough situation,—what law governs? One state may require such a contract to be in writing, or even under seal, the others may not. One state, and not another, may permit the contract to be transferred by assignment. Some essential term in the contract, as "number one barley," "dollar," "a reasonable time," may mean one thing in one country, and another in another. Usury laws may differ. There may be different statutes of limitation. The measure of damages for breach of the contract may vary, and so forth. May a married woman enter into a valid contract? When does a minor come of age? The current of authority seems to be setting in the direction of making most of these questions depend, not on domicil, but on the law of the place where the contract is made.

The judicial committee of the privy council,—the highest court of appeal for the British empire,—has questions like these constantly before it. The statement of a case may begin like one of Conrad's novels: "The plaintiffs are a firm of Glasgow merchants who have a branch house in Bombay; they deal largely in Eastern produce. The defendants are merchants in Hong Kong. Through the medium of brokers in Java the plaintiffs and the defendants entered into three contracts," and so forth.

The next case, I may remark, will decide that a wife, after obtaining a judicial separation from her husband in Ontario, where there is no divorce except by act of parliament, may not go to the province of Alberta, where there is a modern divorce statute, and have her marriage dissolved; as under the old *Baron and Feme* rule, which is still in effect throughout the British empire, her domicil is not in Alberta, and the courts of that province have no jurisdiction, in the international sense. Another case will determine what law applies when railway engineers enter upon land in Zanzibar (a British protectorate) and lay tracks without the owners' consent, and the owners claim compensation for the land, with the railway included as part of its value—the English rule,—while the railway people ask to have the local Mohammedan law applied, under which the owners can recover only the value of the land without the railway on it.

Only rights created under the laws of a *civilized* state are enforced elsewhere. You needn't expect to get a divorce in Zululand that will be good in Illinois. The problem is simply to find a state backward enough not to be shocked at your application, and far enough along to be classed as civilized, so that its judicial decrees have extraterritorial recognition. This would be the very pigeon-hole in which to file Nevada away, were it not for the full faith and credit clause of the federal constitution. There must also be *due process of law*,—notice, so far as practicable, and an opportunity to defend (corporations of other states and non-resident motorists please observe); and fraud on the the court vitiates any judgment or decree anywhere.

As we will not enforce here the judgments of foreign courts in which we have no confidence, so we will not submit the rights of our citizens to the jurisdiction of such courts. In early mediaeval times the little communities of foreign merchants in Oriental countries were self-governing, and a parallel has been drawn between these and "the self-governing communities of foreign students which, at Bologna and elsewhere, were eventually developed into Universities." In countries like China (and, until recent years, Turkey), so-called extraterritorial courts have been established. "The Europeans or Americans," it has been said, ". . . . form classes apart, and would not feel safe under the local administration of justice which, even were they assured of its integrity, could not have the machinery necessary for giving adequate protection to the unfamiliar interests arising out of a foreign civilization." As countries rise in the scale of civilization their feeling against being branded as inferior grows in intensity, and the situation becomes very difficult.

Why do we recognize here rights acquired abroad, perhaps by foreigners against our citizens? On the principle of comity, it used to be said by everybody, as if when an American borrows money in Paris and

gives his note, and is sued on the note here in Illinois, the Illinois courts, in entertaining the suit, are showing courtesy, or paying a compliment, to the French Republic! It is universal natural justice in part, and in part enlightened self-interest. Lord Chancellor Nottingham, in the house of lords, in 1688, said of a foreign divorce: "It is against the law of nations not to give credit to the judgments and sentences of foreign countries, till they be reversed by the law, and according to the form of those countries wherein they were given. For what right hath one kingdom to reverse the judgment of another? And how can we refuse to let a sentence take place till it be reversed? And what confusion would follow in Christendom, if they should serve us so abroad, and give no credit to our sentences?"

Gentlemen, we have been dealing for most of the evening with that very modern department of the law which on the continent of Europe, and sometimes in England, is known as "Private International Law," but generally in England and always in the United States as "The Conflict of Laws." Neither is a satisfactory term; we have simply to decide, in a given case, what law applies, that is, the law of what state; in other words, to make a *Choice of Law,* another suggested name.

The subject is of yet unknown reach. It is law in space, to borrow Professor Beale's brilliant adaptation of a phrase of Savigny's; we have carried law into a third dimension. Dicey's classical treatise began fifty years ago as a book on Domicil, but, as I have said, that is no more than one province, though no doubt the most important, in the vast domain we have been exploring this evening. An attempt has been made to reduce the subject to one principle,—the principle of *effectiveness:* in a given set of circumstances any state may act which can act effectively; that state must act which alone can act effectively; if several states can act with different degrees of effectiveness, that state should act which can do justice most completely, under the circumstances; if more than one state can act with equal effectiveness, that state should proceed whose jurisdiction is first invoked. This is a principle which in one form or another is slowly making progress in different fields of law; our fellow-member Dean Pound has done much to launch the principle and sustain its validity.

We may state our case in terms of the advance of civilization, and a larger, a more intelligent self-interest of the peoples of the world. Have we not seen narrowness of outlook erected into a political maxim, and a great nation urged to decide questions of empire on the psychology of the street lout who in every stranger sees a natural enemy? The Texas ranger knew that when the house next door to yours is in a blaze, it is the part of prudence for you to help put out the fire. But a certain fine and generous chivalry was mixed in with all his prudence, and when he saw some act of brutal injustice, a child or a woman struck, he wanted to know the reason why. We should feel chilled if we found him after a few years, living at ease, always when called on for aid to some one in trouble, asking what business it was of his. In 1848 or 9 Dante Gabriel Rossetti, then an eager boy of 20 or 21,—this is the centenary of his birth,—wrote a sonnet "On Refusal of Aid Between Nations." Its theme was the indifference of the rest of Europe to the national struggles of Italy and Hungary against Austria, but it has a universal, an eternal appeal:

> Not that the earth is changing, O my God!
> Nor that the seasons totter in their walk,—
> Not that the virulent ill of act and talk
> Seethes ever as a winepress ever trod,—
> Not therefore are we certain that the rod
> Weighs in thine hand to smite thy world; though now
> Beneath thine hand so many nations bow,
> So many kings:—not, therefore, O my God!—
>
> But because Man is parceled out in men
> Today; because, for any wrongful blow,
> No man not stricken asks, "I would be told
> Why thou dost thus;" but his heart whispers then,
> "He is he, I am I." By this we know
> That our earth falls asunder, being old.

* *

There will never be a United States of Europe, a Parliament of Man, a Federation of the World, an overriding constitution, compelling the respect of the constituent states for each other's adjudications. But a fuller and more clear-sighted recognition by states of private rights that have had their origin in other states may accustom us to the not very easy view that the citizen of a foreign state is also a man and a brother, doing justice in his courts to our just claims, trying to attain something like a sympathetic understanding of the seeming-strange ideas of alien peoples, and confidently expecting from us the like treatment. No Englishman could ever again be truly parochial after studying a volume or two of the judgments of the judicial committee of the privy council.

Let us read once more the often-quoted and ever-fresh words of Justice Holmes:

"I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States. For one in my place sees how often a local policy prevails with those who are not trained to national views. . . . For most of the things that properly can be called evils in the present state of the law I think the main remedy, as for the evils of public opinion, is for us to grow more civilized."

America has contributed the greatest name, Joseph Story, and a perfect laboratory for problems in the conflict of laws. We have forty-eight states and a nation, and American citizens now have business and social relations with all the world. The study and development of the doctrines of the conflict of laws, by lawyers and citizens, will enlarge our ideas in the right way, predispose us to give fair consideration to the very different point of view of others, and tend through justice to the promotion of peace on earth, good will to men.

THE TRAINING OF LAWYERS IN GERMANY

By Louis O. Bergh
Member of the New York City Bar

THE subject of how to train our lawyers holds, and deserves to hold the attention of our profession. The writers on this topic usually base their suggestions on a consideration of the past history of our profession in this country and their personal ideas as to the social function of a lawyer. This method can, and should be improved by also giving some thought to the experience of other countries in training their lawyers.

In the rare cases where this has been done, only the practice of the English and occasionally the French Bar seems to have been examined. I believe that we may derive profitable suggestions also from the German method of educating lawyers. The German Bar has a very high standard professionally as well as ethically. In distinction from the English and French Bars, it has not the division of lawyers into two classes, but follows the same system as ours of having officially only one class of lawyers.

On the other hand, certain differences must be noted if we are to understand certain features of the German system. The total number of attorneys in Germany is not quite 15,000. This is probably not quite 10 per cent of the number of American attorneys, although the German population is about 55 per cent of ours. And yet, while I do not have the exact figures, I do not think that the number of law suits in Germany is relatively smaller than in our country, for our notion of the stubborn "Dutchman" seems to correctly indicate a national quality; besides, the German procedural system is less technical than ours, and, therefore, causes less expense to the parties and makes it economically possible to sue even for the smallest amounts. Furthermore, although attorneys do not accept cases on a contingent fee basis, the poor man also has a chance to fight his case, if there is only a slight chance of success, through three instances.

In spite of this fact, the number of German attorneys seems to be more than sufficient. For the German Bar is exceedingly worried about the great increase in the number of attorneys and the still greater increase in the number of law students in the last few years, and there is considerable talk of a legal restriction of the number of attorneys that may be admitted to the Bar. This disproportionate increase in the number of German law students is all the more notable because of the onerous training required. Briefly, it is as follows:

After graduation from school, that is after twelve years of study, the young student, 18 to 20 years old, goes to a University and immediately starts his law course. It is desired that he occupy himself also with matters of general education, but such courses are not obligatory. Even though without such general university work, he has a fair cultural foundation, because as a rule the requirements demanded for graduation from a German High School are considered to be equivalent to a two years' course in our best colleges. From my observation and information I think that as to maturity the graduate of a German High School is inferior to the American student after two years in a college. However, the scope of his knowledge and his ability to tackle theoretical matters in a scientific way seem to be greater than those of the average graduate of an American college.

The German law student must study for at least three years in the university, before he will be admitted to his first legal examination. During this time he enjoys absolute freedom. There are no examinations in between, and nobody asks whether he actually visits the courses for which he has registered. And indeed I am told that he takes advantage of this situation, especially in his first year. At least for this period it can be said that as a rule the American law student works more than the German. The absence of German students from the university courses are not caused by remunerative work. The German student does not "work his way through college." Not that there is a social stigma attached to it, but side-work for a living is frowned upon, because it does not fit into the peculiar academic atmosphere of German university life, an atmosphere which does perhaps as much for the education of the student as the courses themselves.

This "academic liberty" produces probably maximum results in a few, but a lower average than our system. The German motto is: "To produce men one has to risk boys." This is not the American attitude. To imitate the German system is in my opinion neither advisable nor possible.

After at least three years of study he will be admitted to the first legal examination. This examination is a State examination, the examiners being university professors, judges of higher courts and lawyers of high reputation. The candidate must write a legal opinion on a case, the facts of which are submitted to him, or a treatise on a purely theoretical question. For this he has several weeks' time. But these studies are lengthy affairs, and the candidate is required to work through and discuss the entire literature, not merely the court decisions. Then he must write legal opinions, under supervision on several cases which are given to him, one or two cases per day. For these opinions, he can only use the text of the codes. Finally he has to undergo an oral examination, wherein about five or six candidates are questioned for one or two days. This examination is a fairly good means to gauge the candidate's knowledge as well as his ability to apply this knowledge.

After this examination the "Referendar," at least in Prussia, passes a period of three years (before the war it was four years) as an apprentice. During this time he becomes attached to almost all the various kinds of courts, and for about three quarters of a year to an attorney whom he may select himself. The judges and lawyers are supposed to explain their work to the Referendar. The Referendar is not to be considered as an assistant. Naturally, a judge will request the Referendar to

draft decisions and orders, and if the Referendar is clever enough to do that in a satisfactory way, this will lessen the work of the judge. However, from what I am told, frequently the correction of the draft takes longer than if the judge had made the decision himself.

After this period the Referendar is admitted to the second legal examination which takes place before a State Commission. This examination is similar to the first one, but although it considers also the training of the candidate in the theory of law, it lays more value on the practical side.

Upon passing this examination, the candidate is admitted to the Bar.

As was explained above, all the examinations required are State examinations, although in the first examination the influence of the university's professors is very strong. The only academic examination which may take place is the examination for the doctorate, which although made by a great many lawyers, is purely voluntary.

The German system of training lawyers seems to me to be worthy of attention, especially in the following respects:

1. The preliminary educational requirements.
2. The German method of legal examinations.
3. The apprenticeship period. The young lawyer who is admitted to the Bar in our country considers his first years generally as a period of training, and therefore in practice also, our young lawyers undergo a period of apprenticeship.

In two points there is however a difference. Our lawyers are interested to get as much assistance as possible from the young apprentice to whom they pay a salary, while the young German lawyers, not being paid during their time of apprenticeship, are more or less systematically introduced to the intricacies of the legal practice, without being obliged to do mechanical work, from which they would learn but little of value.

This apprenticeship idea is not limited on the European Continent to the legal profession, but is applied to all trades. Just as this idea has been making headway in certain trades in the United States, I believe it will finally be applied also to our profession.

The other difference is that the young lawyer does not see only the work of the lawyer, but also that of the courts. He is present if the collegium of judges retires for deliberation of a case, and I am told, is often asked his opinion before the judges have taken a stand in the matter.

This work with the bench has certain beneficial influences. It gives the young lawyer an excellent training, a better one than he could probably obtain from any lawyer. Besides that, it gives him an opportunity to watch the activities of many lawyers, good and bad ones, from a somewhat elevated standpoint, and to note the reaction of the judges to them. This should be a better guarantee for the proper ethical conception of the legal profession on the part of the young lawyer than the strictest examination of our Character Committees.

Naturally whatever one may think of this method, it could certainly not be applied in the same form in our country, for one controlling reason,—because of the overwhelming number of law graduates.

However, I am far from advocating the direct application of any of the features of the German system. Even if we would, we could not make radical changes and the use of foreign methods must be preceded by their adaptation to our system and our viewpoints. But it may well be that we would profitably use some of the features of the thorough and successful German plan.

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THE JUDGE'S NOSEGAY AT THE OLD BAILEY

By Hon. William Renwick Riddell
Justice of Appeal, Ontario

THOSE who have ever been in the Old Bailey Courtroom during a criminal trial would probably notice a bouquet of flowers set in front of His Majesty's Justice, the Trial Judge. This is now but an ornament, like the little tag on the Barrister's gown; but at one time it was supposed to be of great value as a prophylactic. The Judge had to be protected from infection from the prisoners to be tried before him.

What was chiefly to be guarded against was what was generally called Gaol Fever: it was supposed to be caused by the foul air of the prisons, &c., and was very contagious. It was sometimes called Ship-Fever, Spotted Fever, &c.: we now call it Typhus Fever, and know that it is transmitted from one person to another by the "cootie" or body-louse, *Pediculus corporis*, which was the curse of our trenches in the Great War.

In olden days and, indeed, until our own times, it was believed to be generated out of filth and overcrowding, bad diet and close foul air, and transmitted by the air, just as until the other day it was believed that Malaria came from the foul and heavy air of swamps, whereas we now know that it is transmitted by a species of mosquito, as the Plague by the rat-flea. Quite a large proportion of living medical practitioners were taught that "Typhoid comes from bad water, Typhus from bad air."

To prevent the infection from dock to bench, a nosegay of wholesome and sweet-smelling flowers was placed before the Judge—just as the old physicians carried a pouncet-box in the head of their cane, full of fragrant spices, which from time to time they smelt in order to ward off infection. The nosegay was in fact as ineffective as the pouncet-box to keep away the noxious intruder; but it was useful in its psychological effect—like bread-pills, a harmless and heartening *placebo*.

That the danger from infection was real is made vividly manifest by what took place at the Old Bailey in April, 1750. The story has been told by more than one contemporary writer, by none better than Mr. Justice Foster in his *The Report*, pp. 74, 75—he was then on the Bench.

One Mr. Clarke was on trial, and the Court room and all the passages were crowded, it being a case that created great interest among the people—the extreme and unusual heat did not suffice to keep them away.

Many noticed a very noisome smell, and an enquiry subsequently ordered disclosed that the whole Newgate Prison and all the passages were and long had been in a very filthy condition—this was later and according to the ideas of the time, supposed to have had its share in causing the tragedy which followed.

In a week or ten days, many of those who were present at this Trial were seized with a most malignant fever; and very few recovered—a somewhat curious circumstance was noticed, namely, that women were little affected, only one out of the many present being known to have taken the fever.

What was also noticed at the time was that there was no more sickness in Newgate than usual—this was much remarked on, as previous outbreaks had occurred when Gaol-fever was rampant in the prison. Mr. Justice Foster says: "This circumstance . . . suggesteth a very proper caution, not to presume too far upon the health of the gaol, barely because the gaol-fever is not among the prisoners. For without doubt, if the points of cleanliness and free air have been greatly neglected, the putrid effluvia which the prisoners bring with them in their cloaths, &c., especially where too many are brought into court together, may have fatal effects on people who are accustomed to breathe better air; though the poor wretches who are in some measure habituated to the fumes of a prison, may not always be sensible of any great inconvenience from them."

From the contagion of this memorable court day died Mr. Justice Sir Thomas Abney of the Court of Common Pleas, a very able and conscientious Judge and a strong Hanoverian, Charles Clarke, a Puisné Baron of the Exchequer, Sir Samuel Pennant, Lord Mayor of London, who had been joined in the Commission of Oyer and Terminer and General Gaol Delivery, Sir Daniel Lambert, (not *the* Daniel Lambert but) one of the Aldermen of London, a Barrister-at-Law, two or three Students of The Inns of Court; an Under-Sheriff, an officer of Lord Chief Justice Lee attending his master in Court at that time (the Chief Justice himself escaping), several of the Middlesex Jury, and about forty others "whom business or curiosity had brought thither."

And hence the Judge's nosegay at the Old Bailey.

By the way, in those days, law-students had their rights—Mr. Justice Foster in his *Discourse I of High Treason*, p. 214, (note), says: "Students of the Inns of Court . . . coming properly habited in students' gowns have a right to the use of the middle gallery on the left hand of the Court (at the Old Bailey) during the trials. The officers who make money of the galleries have sometimes behaved with rudeness towards the students; but the Court upon complaint hath constantly done them justice"—*more suo*. That gallery is an excellent place for seeing and hearing all that is going on—I have tried it.

Gaol-Fever was not unknown in this favored land. Of the fifteen persons found Guilty of High Treason at the Special Assize at Ancaster, Upper Canada, in June, 1814, (they had taken part with the American invader) a number were sent to Kingston and incarcerated in the Gaol there. Of these, three—all Americans—died of Gaol-Fever in March, 1815, the other four receiving a Pardon conditioned on their abandoning the Province and all other British possessions for life—which meant going back to the United States.

LETTERS OF INTEREST TO THE PROFESSION

Commissions to Consular Officers to Take Testimony

The following communication from the Chief of the Division of Foreign Service Administration of the State Department makes a suggestion to which members of the Bar will doubtless be glad to conform:

Mrs. Olive Ricker, Executive Secretary,
American Bar Association.
Madam:

The Department has been informed that, due to the incorrect manner of address, considerable inconvenience and delay has resulted in the execution by American consular officers of commissions to take testimony issuing out of courts in the United States. It is stated that in their desire to obtain information as to the name or names of the particular consular officer or officers to whom a commission might be directed, courts or attorneys have frequently used as references obsolete Departmental publications. This procedure has, as stated, often resulted in confusion and delay due to the frequent transfers of such officers from one post to another subsequent to the issuance of the publications.

In order to prevent, in so far as possible, a reocurrence of these mistakes, it is thought that you might desire to publish in the JOURNAL a notice to the effect that, if not inconsistent with the rule of the particular court where the testimony is to be used, and in the interest of abundant caution, it might be desirable that commissions be directed "To Any Consular Officer of the United States of America at ————, ————," so that, should it be impracticable for the principal officer to execute that instrument, one of the other officers at the post might do so.

If, for any reason, it should be necessary that, in order to comply with the rule of the particular court or the requirements of the law of the particular State, the consular officer who is to execute the commission be mentioned by name it is suggested that the court or the lawyer concerned communicate with the Department of State with a view to obtaining information upon the subject and the name or names of the officer or officers who may execute the commission.

It may also be stated that in some countries foreign consular officers stationed therein may not take testimony under the authority of a commission or other similar instrument.

Your obedient servant,
For the Secretary of State:
HERBERT C. HENGSTLER,
Chief, Division of Foreign Service Administration.
Washington, D. C., Dec. 3, 1928.

Plight of District of Columbia Residents

Editor, AMERICAN BAR ASSOCIATION JOURNAL:

The National political campaign just ended has served to again center attention upon a condition, the existence of which is unknown to the Bar generally. That condition is the fact that the people of the District of Columbia are denied the right to vote, either for local officers or in a National Election for Federal Officers. There are now some half million people residing within the District of Columbia who are denied the right to vote. It would seem that if the Bar of our country is made fully aware of the fact, that here, at the Nation's Capital, the Seat of the Government, a community of half a million people, patriotic, intelligent, loyal citizens, bearing their full share of the tax burden, is denied the right of suffrage, the Bar of the several States will join us in an imperative demand upon Congress for the correction of this condition.

The Bar of the Country can render a very real service by considering this matter and aiding the people of Washington in obtaining the right to vote. For a Government founded on the theory that "taxation without representation is tyranny," to deny the citizens of its Capital the right to vote is certainly an absurd situation.

It is hoped that if this matter is brought vividly to the attention of the various Bar Associations, they will aid the citizens of Washington in their deplorable political plight. Millions of Americans are unaware of the fact that the right to vote is denied to all citizens of the District of Columbia. I believe, if the attention of the members of the Bar throughout the country can be focussed on this matter it will soon be corrected.

FREDERICK S. TYLER.

Washington, D. C., Nov. 5, 1928.

"Thanking the Jury—and the Reverse"

EDITOR, AMERICAN BAR ASSOCIATION JOURNAL:

In connection with my recent article under the above title, it may be of interest to read the following, being portion of an anonymous letter signed "Non-Juror" which I have received from England. The fact that the episode described therein was noted at the time is significant.

WILLIAM RENWICK RIDDELL.

Osgood Hall, Toronto, July 23, 1928.

July 6th, 1928.

Lord Justice Riddell,
Court of Appeal,
Toronto, Ontario.

My Lord: Happening to have read in the Law Times of June 30th, 1928, your Article reproduced from the American Bar Association Journal upon "Thanking the Jury—And the Reverse," I venture to suggest that the practice is not quite so infrequent as you might imagine, even in modern England.

Though I unfortunately cannot recall the name of the case, I may say that it has happened within very recent years, as I remember distinctly noting the episode at the time. I have no positive recollection of the name of the judge, who may have been Mr. Justice McCardie. But I feel sure that the Counsel in question was the late Sir Edward Marshall Hall, who requested that the thanks of the party for whom he had successfully appeared might be conveyed to the jury, which was then done by the learned Judge himself. It is, of course, a less reprehensible proceeding than the unseemly practice which you repressed in your Court. But it does suggest that the expression of appreciation of the Jury's services is still sometimes heard, even under circumstances in which there may be less exception to be taken to it.

But a somewhat analogous practice of thanking a Judge is certainly much more frequent in the English Courts. It is quite common where the Court has perhaps taken a point which is helpful to the party for whom a particular counsel may be speaking, and it is not unusual even at the conclusion of any argument. Such an expression stands, of course, upon a totally different footing to the instances cited in your article, of the visit of the Portuguese Ambassador to the Chief Justice Scroggs, and of Guiteau's Counsel to Mr. Justice Cox. Nor is any harm done or intended, and I have never heard of any exception being taken.

While it might be said to be usual when the Court accedes to any application, it is not infrequent even when the application is refused; the idea, I think, being that it was necessary to place the matter before the Court, and that, having troubled the Court, it was becoming to thank the Court for having dealt with it.

"Information for Prospective Law Students"

EDITOR, AMERICAN BAR ASSOCIATION JOURNAL:

I am writing you as Editor in Chief of the American Bar Association Journal, to call to your attention one or two points in the article entitled, Information for Prospective Law Students, by H. E. Stone, Dean of Men, West Virginia University, which appears in the October Issue of the American Bar Association Journal.

I should like particularly to call attention to the innacuracy of paragraph 15 in this article. This states that Harvard, Columbia, Northwestern and Western Reserve Universities admit to their Law Schools only those who have graduated from the four years college course. The latest classification of Law Schools is found in the Bulletin No. 21 of the Carnegie Foundation for the Advancement of Teaching, just published, and entitled, Present Day Law Schools in the United States and Canada, by Alfred Z. Reed. On page 169 Mr. Reed points out that Harvard, Pennsylvania and Pittsburgh are the only Law Schools requiring an A.B. degree for admission. Northwestern requires a degree for admission to the three year course, but accepts three years of college [illegible] for admission to the four year course. Four Law S[illegible]e listed as requiring an A.B. degree from appl[illegible]ng from other Universities, while permi[illegible]e Arts College to

register in the Law School, receiving the A. B. degree at the end of the first year of law. These Law Schools are Cornell, Stanford, Western Reserve and Yale. Five Law Schools are listed as requiring three years of college work for admission. They are California, Chicago, Columbia, Michigan and William and Mary.

May I also call attention to the fact that in paragraph 13, the abbreviation for Bachelor of Laws and Master of Laws should be LL.B. and LL.M. and not L.L.B. and L.L.M. Also the statement that the S.J.D. degree requires two years of graduate work is not generally true.

The 14th paragraph does not seem to give a well balanced list of first class Law Schools. For instance it leaves out the California University School of Jurisprudence and Stanford University Law School.

I believe that a list of the eleven leading legal periodicals such as is contained in paragraph 20 would properly include the Cornell Law Quarterly.

I would also suggest in paragraph 27 among the great contemporary names in law, Mr. Justice Holmes of the Supreme Court of the United States, and Judge Cardozo of the New York Court of Appeals.

Ithaca, N. Y., Oct. 11. CHARLES K. BURDICK.

Slogans As to Making Wills and Appointing Executors

EDITOR, AMERICAN BAR ASSOCIATION JOURNAL:

The banks and trust companies are great believers in slogans and many of their slogans are good. Those about thrift have been constantly hammered in and have proved of definite value to the country. The most familiar slogan is "Make your will and appoint a bank as your executor," and of this slogan the first clause has real merit. The exhortation as to choosing your executor is, however, not axiomatic and should be complied with by a prospective testator only after careful thought. In newspapers, in pamphlets and in the sky at night flashing on electric signs the business man meets again and again the statement that the bank or trust company never dies, never becomes ill, never travels and never takes a vacation; it has investment experience and gives undivided attention to the handling of estates, while the individual executor is untutored and overburdened with his own affairs; in fact, under all conditions the bank is for every man the best possible executor. Yet these statements everywhere greeting the eye are but half truths as lawyers familiar with the business and personal problems confronting executors well appreciate. In a great majority of cases it is obvious to one thoroughly informed that a husband, son, other relative, lawyer, or business friend makes the best executor and not a trust company where the personal element is lacking. The lawyer versed in the handling of estates knows that while the trust company never dies, never becomes ill and never takes a vacation, yet the personnel of such a company is human and does all of these things; that only certain individuals employed by the trust company give undivided attention to the handling of estates and that the quality of the service given by the trust company depends entirely on the character and ability of those employees.

The selection of an executor by a testator is an important task but the principles upon which such a selection should be made are quite simple. If a testator has no friends or acquaintances of approved integrity and business ability who will act as executors, then clearly an opportunity is presented where a bank or trust company can render a real service by so acting. With a bank or trust company as executor, the friendless testator is morally sure that his estate will not be stolen or squandered. The average testator, however, especially the man of considerable means, numbers among his friends individuals possessing the honesty, business capacity and experience which an executor should have. It is, of course, to his interest that those specially qualified friends should after his death be in control of his estate. They know him and his family and will have a personal interest in carrying out his wishes. In a case of this kind the estate department of a trust company with its frequently changing personnel and lack of personal touch cannot possibly render as satisfactory a service. The placing of a trust company in control of an estate is also open to the serious objection that a merger or consolidation of one such company with another often results in a reorganization and new policy for its estate department.

The well-to-do testator may, however, through his will establish with reasonable certainty a definite policy for handling his estate. To effect this result he may name as executor three or four of his trusted business friends and provide in case of their death or incapacity that certain other individuals shall act as substitutes. In such a case a trust company may well be added as executor. It will then do the detailed work of the

estate making investments in line with the policy adopted by a majority of the executors.

The banks and trust companies, through their advertising campaigns, have convinced the average man of property that the making of a will is greatly to his advantage, and in this way they have rendered a real public service. Lawyers, for centuries, have realized the value of wills but never in an organized way have made any attempts to sell the idea to the general public. The property owner who, as a result of the initiative and arguments of a bank, has decided to make his will, justly feels that the bank has done him a good turn. He is therefore rather inclined to accept at face value the familiar slogan that the bank makes in all cases the best possible executor. He may possibly, in such a case, forget that through a change in stock control of a trust company, its estate department at times may become less efficient or that through a merger with another institution the present personnel of that department may drop entirely out of the picture. He may, on the other hand, put undue emphasis on the fact that a trust company never becomes ill and never dies.

Without doubt the bank or trust company often makes a satisfactory executor, but its appointment as executor in many cases is extremely inadvisable. The legal profession knows this and knows what principles should control when an executor is being selected. Sometimes a trust company should be chosen, sometimes a business friend, sometimes the testator's lawyer; in many instances all three may well be made executors. But, however the problem is to be solved in a particular case, the legal profession through its State and local Bar Associations should on this subject undertake a thorough-going publicity campaign. It should through these Associations and by proper publicity methods see to it that every person about to make a will has when choosing his executor clearly in mind the various factors involved.

Buffalo, N. Y., May 21. H. D. BLAKESLEE, JR.

Antiquated Legal Verbiage

EDITOR, AMERICAN BAR ASSOCIATION JOURNAL:

With interest I read the letter of Robert McMurdy in the June number deploring the profession's tenacious retention of excess and antiquated verbiage.

There is no doubt as to the accuracy of his criticism. However the blame does not, I believe, rest entirely with the lawyers.

To be sure, if (to use an illustration of his) the generally accepted form in wills was to bequeath "the rest, residue and remainder" of an estate, there are many attorneys who will perpetuate this form simply because they lack the initiative to discover and employ a more simple equivalent; that is, an equivalent due to legal reforms and progressed thinking.

On the other hand there are at least two powerful deterrents which tend to restrain any lawyer from initiating reforms, namely our rule of stare decisis and the attitude of the judiciary toward innovations.

If in 1840 the court of last resort approved a will containing a lot of excess verbiage it was not long before the lawyers, when drawing wills with similar provisions, copied the verbiage of the adjudicated form verbatim, thus saving themselves mental effort and also the uncertainty as to the soundness of their substitute form. They knew that form was all right because the court had passed upon it.

Again, it would not be long thereafter before Judge Blank disallowed a will with simpler language by some process of refined reasoning which failed to convince but which altered the result.

A combination of these two results would make any lawyer hesitate before changing or dispensing with a syllable lest the desired result be lost.

Yes, to me the law is always archaic in its mechanics and always will be so long as the decisions depend on the mechanics and not solely on the facts.

Boston, July 10. CHESTER W. KINGSLEY.

NEWS OF STATE AND LOCAL BAR ASSOCIATIONS

Colorado

Colorado Bar's Successful Campaign

The Colorado Bar Association held its thirty-first annual meeting in the Rose Room of the Antlers Hotel at Colorado Springs on September 14 and 15, 1928.

President Donald C. McCreery, of Denver, opened the sessions on Friday morning, September 14. Twenty-six new members were elected, making the present active membership the largest in the history of the Association. The Treasurer's report showed the customary steady increase of assets. Routine statements of committees demonstrated that live interest in the business of the organization throughout the preceding year which marks the Colorado Bar.

Of chief import was the showing of the Special Committee on Judicial Salaries, George P. Steele, of Denver, chairman. This presented the climax of the effort of The Colorado Bar Association to secure the adoption of an amendment to the state Constitution restoring to the legislature that power to fix salaries for members of the Supreme and District Courts of which it had been deprived for forty-five years. For more than four years last past the Association has conducted a campaign of education among the people through newspaper advertising, radio broadcasting and public speaking to permit the raising of judicial salaries to equal modern necessities. The expense of nigh $25,000 in such propaganda has been borne almost wholly by the lawyers of the state. (The labor culminated in success on November 6, 1928, at the third trial, when the amendment was adopted by a majority of over 17,000 votes. Compared with a majority of more than 62,000 against the amendment at the first contest in November, 1924, the final victory is one in which the Association takes warranted pride).

Friday night, September 14, the Honorable Henry Archer Williams, of Columbus, Ohio, delivered the annual address before the Association on "Our Shifting Constitution." The speaker's crystal clarity, trenchant analysis and virile eloquence in presentment amply justified his high Eastern reputation.

Saturday morning, September 15, President McCreery gave the President's annual address, on the subject, "The Reign of Law," and Henry McAllister, of Denver, contributed a paper on "Suggestions for Reform of Criminal Procedure." In the afternoon, Earl H. Ellis, of Denver, discussed "The Public Purse," and former United States Senator Charles S. Thomas, of Denver, delivered an address on "The Colorado Constitution," treating of feasible and non-feasible changes therein under present conditions.

Saturday night saw the end of the sessions in the annual dinner at the Antlers Hotel. Donald C. McCreery, as toastmaster, introduced Hon. Henry A. Williams, of Columbus, Ohio, and George P. Winters, Henry C. Vidal, Hon. Benjamin C. Hilliard and Cass E. Herrington, of Denver, as post-menu spokesmen.

The feminine members of lawyers families in attendance were entertained by the El Paso County Bar with a tea at the Cheyenne Country Club on Friday, and with a motor car drive over the mountain boulevards on Saturday. As an innovation the ladies were present during the after-dinner speeches on Saturday night.

General officers of the Association for 1928-1929 are: President, Cass E. Herrington, Denver; First Vice-President, J. Alfred Ritter, Colorado Springs; Second Vice-President, Mortimer Stone, Fort Collins; Secretary and Treasurer, Harrie M. Humphreys, Denver.

H. M. HUMPHREYS, Secretary.

Denver Bar Introduces Innovations

Much water has run under the bridge since the Denver Bar Association's last report to "the Journal."

We have learned a lesson in political persistency, for after a struggle extending through several biennial state elections and after a long and expensive publicity campaign of education, the people of Colorado saw fit, on November sixth last, to adopt the constitutional amendment restoring to the legislature the right to fix the salaries of judges of the supreme court and of the district court, as well as those of the governor and his secretary. Formerly, as I think we have explained before, these salaries were fixed by constitutional provision and had been unchanged in more than forty years. Now, however, thanks to the unremitting efforts of the Denver and Colorado bar association committees and especially of one individual—the Honorable George P. Steele, there is a prospect that the next legislature will correct this injustice to justice in Colorado.

An innovation in bar association meetings was introduced at the meeting of the Denver Bar October thirtieth when

a debate was held between representatives of labor and employers on proposed changes in the Workmen's Compensation Law. This debate was both stimulating and informative and the plan would be well worth a trial in other bar associations.

Another innovation will be introduced at the dinner meeting to be held at the University Club in Denver on December seventeenth when the Denver Bar Association will meet with the Denver County Medical Association to discuss problems of mutual interest.

Still another innovation, for which our new president, Henry W. Toll is likewise responsible, is the change in the name of the Association's monthly publication from the hackneyed "Record" to the somewhat intriguing name of "Dicta." With the change in name, there is also a change in typography and style which should result in a much more modern and interesting publication.

Among other phenomena of the local election on November sixth, was the election by an overwhelming majority of Judge Robert W. Steele, successor to Judge Lindsey on the juvenile court bench. Judge Steele is a Democrat and the only Democratic candidate on the county ticket to be elected in the face of a veritable landslide for the Republican party. Incidentally, he was recommended for the office by the Denver lawyers at their bar primary, as were also Judge Frank McDonough, district judge, and Judge George A. Luxford, county judge, who were likewise elected to succeed themselves. It begins to look as if capable and conscientious judges were at last being appreciated by the voting public.

JOSEPH C. SAMPSON.

Florida

Conference of Delegates of Local Bar Associations of the State of Florida

The first semi-annual conference of delegates of Local Bar Associations held pursuant to action taken at the Tampa meeting of 1927 was held at Orlando, Florida, on Saturday, November 10, 1928.

This meeting was held at the beautiful new Orange Court Hotel where commodious quarters amid attractive surroundings were obtained. The attendance was considered large for a meeting of this kind, and at the close of the meeting it was deemed to be so successful that it was ordered, on motion of Mr. J. C. Cooper, Jr., that semi-annual meetings be continued to be held in the future.

There were in attendance at this conference representatives from eleven local Bar Associations, as follows: Jacksonville Bar Association, Orlando Bar Association, Dade County Bar Association, Bar Association of the 24th Judicial District, Winter Haven Bar Association, Lakeland Bar Association, Polk County Bar Association, St. Petersburg Bar Association, East Volusia County Bar Association, Hillsborough County Bar Association, Bar Association of the 17th Judicial District.

There were forty-four in attendance, including Robert H. Anderson, president of the Florida Bar Association; Gov. Hutchinson, Secretary of the Florida Bar Association; Ed R. Bentley, secretary of Conference of Delegates; Congressman H. J. Drane, Dean Harry C. Trusler, Dean of Law Department of the University of Florida; Hon. Armstead Brown, Associate Justice of the Supreme Court of Florida; and Judge Dykes of Cincinnati.

A carefully prepared program of the highest order was presented and thoroughly enoyed by all who heard it. Unfortunately, Mr. William Fisher of Pensacola and Mr. James R. Bussey of St. Petersburg, who had been requested to prepare addresses, were unable to attend. However, the following addresses were delivered: "A Review of the Work of the American Law Institute," by Harry C. Trusler, Dean of the Law School of the University of Florida; "Some Comments upon the Lien of Federal Judgments in Florida," William T. Stockton of the Jacksonville Bar; "The Work of the Judicial Section," by Hon. Armstead Brown, Associate Justice of the Florida Supreme Court; "The Law Journal," by John C. Cooper, Jr., of the Jacksonville Bar.

Considerable discussion was had by the delegates upon several features of the foregoing addresses, particularly with reference to the address upon the Lien of Federal Judgments in Florida. After a thorough discussion of that subject and consideration of a proposed bill to be introduced in the Legislature presented by Mr. Stockton, a Committee composed of Messrs. W. T. Stockton, Geo. C. Bedell and John B. Sutton, was appointed to re-draft the bill proposed by Mr. Stockton, to remedy the situation pointed out in his address.

A bill was read proposing that Circuit Court Clerks be authorized to file income tax liens and certificates of discharge thereof in a Federal Tax Lien Book to be kept for that purpose. Upon motion this proposed bill was referred to the committee on Federal Liens previously appointed, with instructions to consider and make recommendations.

At the conclusion of the morning session, a delightful luncheon was tendered the delegates and their guests by the Orlando Bar Association, at the conclusion of which the proceedings of the conference were resumed.

During the afternoon session the rule-making power was discussed by Judge A. O. Andrews and others and at the conclusion of the discussion, upon motion of Mr. Lee Guest of the Jackson ville Bar Association, it was ordered that a Committee composed of Messrs. Lee Guest, Judge A. O. Andrews and Wm. G. Ward, go into the question of the rulemaking power by constitutional amendment and co-operate with the Legislative Committee of the Florida State Bar Association with a view to making a report of its recommendations at the next convention of the Florida State Bar Association.

Reports were had from former president of the Florida State Bar Association, W. I. Evans, and President E. Clyde Vining, of the Miami Bar Association as to preparations being made to entertain in that city the executive committee of the American Bar Association and the Florida State Bar Association and Conference of Delegates of Local Bar Associations.

All of the addresses delivered at this conference will be publisherd in future numbers of the Florida State Bar Association Law Journal for the benefit of those members of the association who were unable to be present at the Orlando meeting.

GOV. HUTCHINSON, Secretary.

Ohio

Ohio Bar's Regional Meeting at Dayton

One of the most successful regional meetings of the Ohio State Bar Association was held at Dayton on Nov. 17, according to the account in the Ohio Bar Association Report. It opened with sessions of the general and special committees in the morning, and this was followed by a complimentary luncheon given by the Dayton Bar Association at noon, committee meetings in the afternoon and a banquet in the evening. President John A. Elden presided at the public meetings.

The Committee on Aviation, of which Mr. Daniel W. Iddings of Dayton is chairman, considered section by section a proposed draft for an aviation statute. A sub-committee was appointed to consider the constitutionality of adopting the Federal regulations and making them applicable to the State. The following aspects of this important subject were discussed at the meeting: "Phases of laws in California, Iowa and New York; leaving entire matter of regulation and licensing to Federal Government and not advocating any state legislation thereon; vesting power in a present state official, or a commissioner, or a commission; having both state and federal, or only federal, inspections for licenses; embodying all federal requirements in the state law; effect of requirements as to bond, carrying parachutes, resulting in interstate aviators avoiding the state; approval of concerns building airplanes; limiting applicability of legislation to commercial carriers for hire, and not regulating non-commercial fliers; state legislation prohibiting municipal legislation; and making owners as well as lessee of plane responsible."

The Revision of Probate Laws Committee, of which Howard L. Barkdull of Cleveland is chairman, and the Inferior Court Committee, of which James A. White of Columbus is chairman, also held meetings. The Blue Sky Committee, E. Searles Morton of Columbus, chairman. considered in detail proof of the Fifth Draft of a Statute. It was decided to mail copies of this draft to legislators and various organizations and others interested in the subject with a request for criticisms and comments, preparatory to drawing up the final draft for presentation to the legislature.

The Judicial Administration and Legal Reform Committee was presided over by Vice-chairman Charles F. Schnee of Akron. It devoted its time to a consideration of the reports of the special committees on amendments to the Ohio Corporation Act, the proposed Criminal and Probate Codes and the Inferior Courts bill.

The Executive Committee at its meeting considered the advisability of annotating with Ohio citations the drafts of the American Law Institute but took no final action on the subject.

Among the speakers at the various sessions and functions were Hon. Clarence M. Young, Director of Aeronautics, Department of Commerce, Washington, D. C., who congratulated the Associ-

ation on its interest in aviation law; Supreme Court Justice Robert H. Day, who dwelt, among other things, on the responsibility of the Bar in the selection of judges; President John A. Elden of the State Association, who expressed its thanks to the local Bar for its generous hospitality and hearty cooperation; Chief Justice Carrington T. Marshall, who told what had been done in Ohio to overcome the public criticisms as to the law's delay; Capt. Rowan Adams Greer, Judge Advocate of the U. S. Army, who spoke on "Aviation from a Legal Point of View."

Miscellaneous

At a meeting of the Tacoma (Wash.) Bar Association, on October 27th, the following officers were elected for the ensuing year: Percy P. Brush, President; L. R. Bonneville, Vice-President; W. G. Heinly, Secretary-Treasurer; J. Charles Dennis, A. O. Burmeister, Robert Abel, Herbert Cochran, and Stuart H. Elliott, Trustees.

H. C. Blanton, of Sikeston, was elected president of the Scott County (Mo.) Bar Association at a meeting of that organization in November. Other officers elected were: J. H. Hale, Chaffee, Vice-President; Ray B. Lucas, Benton, Secretary; and Stephen Barton, Benton, Treasurer.

At a recent meeting of the Payne County (Mo.) Bar Association, the following officers were re-elected for the ensuing year: Freeman E. Miller, president; L. G. Lewis of Yale, vice-president; and Henry W. Hoel, secretary.

The Cincinnati (Ohio) Bar Association, at its recent meeting, by acclamation elected Carl M. Jacobs, Jr., as its president.

George M. Conner was elected president of the Fort Worth and Tarrant County Bar Association at a meeting of that organization in November. Hugh B. Smith was elected vice-president, W. Erskine Williams, second vice-president, and R. B. Young, Jr. third vice-president. James M. Floyd was chosen secretary-treasurer. Glenn Smith, Walter B. Scott, Ernest May and Frank J. Wren were named directors.

At a meeting of the Appellate Judges' Association (Texas) in September, Chief Justice R. W. Hall, of the Amarilla Court of Civil Appeals, was elected new president.

The following were elected officers of a recently formed organization of young lawyers to function as a junior body with the Dallas (Tex.) Bar Association: C. A. Matthaei, president; R. H. Dixon, first vice-president; Jimmie MacNicoll, second vice-president; W. H. Jack, secretary-treasurer, and Pat O'Keefe, sergeant-at-arms. Olin E. Nesmith was named temporary secretary.

At the thirteenth annual meeting of the Federation of Local Bar Associations of the Third Supreme Judicial District (Illinois) on October 6th, the following officers were elected for the ensuing year: President, Judge Frank Lindley, Paxton; Vice-President, Judge Stevens Baker, Pontiac; Secretary, George K. Webb, Springfield; Member of Board of Governors of State Bar Association, Judge James Baldwin, of Decatur.

At the annual meeting of the District Bar Association (Illinois) recently held the following officers were selected for the ensuing year: President, Judge W. H. Hart, of Benton; Vice-President, J. Paul Carter, of Nashville; Treasurer, C. P. Hamill of Marissa.

Sperry S. Packard, was chosen President of the Pueblo County (Colorado) Bar Association at its meeting in October. Other officers elected were Ben-

jamin F. Koperlik, Vice-President and O. G. Pope, Secretary and Treasurer.

The Rogers County (Oklahoma) Bar Association, at a recent meeting, elected the following officers to serve for the coming year: President, C. B. Holtzendorff; Secretary-Treasurer, Attorney Dougherty; Vice-President, W. H. Bassmann.

The Madison County (Illinois) Bar Association on October 15th elected the following officers: John B. Harris, President; Thomas Williamson, Vice-President; Donald Warnock, Secretary; Robert W. Tynnell, Treasurer. The following are members of the Executive Committee: Gilson Brown, Alton; George A. Lytle, Edwardsville, and R. G. Kneedler of Collinsville.

Henry Waterman, of Geneseo, was elected President of the Federation of Local Bar Associations of the Fifth Supreme District of Illinois, at the organization's thirteen annual meeting in October. Other officers elected were as follows. Judge W. W. Wright, of Toulon, Vice-President, and Karl Seibel, Princeton, Secretary and Treasurer. C. V. O'Hern was re-elected as a member of the State Board of Governors.

APPLICATION FOR MEMBERSHIP

To The American Bar Association,
209 S. La Salle St., Chicago, Ill. .....192...

I hereby make application for membership in the Association and certify the following:
(a. I am a member in good standing of the Bar of the

State (or States) of.....

I am a member of the following Associations of the Bar.....
(b) I am White ☐ Indian ☐ Mongolian ☐ Negro ☐

NAME.....

MAILING ADDRESS.....

CITY and STATE.....

Endorsed by.....Address.....

Check to the order of American Bar Association for $.....is attached.

If this application is made between July 1 and September 30, the check should be for $8.00; if between October 1 and December 31, for $6.00; if between January 1 and March 31, for $4.00, and if between April 1 and June 30 for $2.00.

A member receives the monthly American Bar Association Journal beginning with the month of his election, and the report of the annual meeting of the Association. This report is a record of the activities of the Association and contains a list of the members.

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